

# BERNHARDT NOMINATION

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## HEARING BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

TO

CONSIDER THE NOMINATION OF DAVID BERNHARDT TO BE THE  
DEPUTY SECRETARY OF THE INTERIOR

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MAY 18, 2017

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## **BERNHARDT NOMINATION**

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**THURSDAY, MAY 18, 2017**

U.S. SENATE,  
COMMITTEE ON ENERGY AND NATURAL RESOURCES,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:20 a.m. in Room SD-366, Dirksen Senate Office Building, Hon. Lisa Murkowski, Chairman of the Committee, presiding.

### **OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA**

The CHAIRMAN. Good morning, everyone. The Committee will come to order.

We are here this morning to consider the nomination of David Bernhardt to be the Deputy Secretary of the Interior.

I will give my opening statement and introduction of Mr. Bernhardt, as will Senator Cantwell, but I think I would ask you, Senator Gardner, to go ahead with your opening introduction so you can then join us up here at the dais. We appreciate you taking the lead in the introductions this morning.

If you would like to proceed?

### **STATEMENT OF HON. CORY GARDNER, U.S. SENATOR FROM COLORADO**

Senator GARDNER. Well, thank you, Madam Chair and Ranking Member Cantwell, for this opportunity and hearing today.

It is my honor to introduce fellow Coloradan, Colorado native and my friend, David Bernhardt, as the Senate Committee on Energy and Natural Resources holds this hearing to consider his nomination to be Deputy Secretary for the Department of the Interior.

Welcome, David and your family, to the Committee, that has joined us today. Will, David's son, may not remember this but that you spent some time at daycare with our oldest daughter.

[Laughter.]

So I have a picture of you in a clothes hamper when you were like this tall with Allison.

We both grew up in rural Colorado. I am from the Eastern plains. Mr. Bernhardt is from the Western slope of Colorado. While the geography of our two homes is quite different, we share a lot of common interests and the development of the values that shape small towns.

We both began our public service only one year apart, both of us interning for Colorado State Representative Russell George, who would later become Speaker of the Colorado House.

Mr. Bernhardt worked with my wife, Jamie, at the Department of the Interior. And their offices, at one point, were just around the corner from one another.

Mr. Bernhardt's personal background and public and private sector professional experiences prove he is a strong voice for the West and extremely well-qualified for the nomination to be Deputy Secretary. He has extensive insight on Western water policy, natural resources policy and Indian affairs, just to name a few. Those that have worked with Mr. Bernhardt commend him for his integrity and wealth of knowledge on the issues under the Department of Interior's jurisdiction.

In 2008, after the Department reached the largest Indian water rights settlement in our nation's history, Secretary Kempthorne personally acknowledged Mr. Bernhardt's work as then Solicitor and stated, "His effective coordination both within Interior as well as with the local, tribal, state and congressional leaders, was essential to the success we celebrate today."

The country will benefit from having Mr. Bernhardt serve as Deputy Secretary, a position that is the second ranking official within the Department with statutory responsibilities as the Chief Operating Officer.

Along with Mr. Bernhardt's professional career, I believe it is important to fully understand his background and the foundation of his interest in public lands which further qualifies him for this role.

Mr. Bernhardt is originally from the outskirts of the small town of Rifle, Colorado. It is located on the Western slope, like I mentioned. Few places more fully embody the spirit and mission of the agency that he has been nominated to lead as Deputy Secretary. Growing up in rural Colorado has instilled in him Western values and interests. To this day, Mr. Bernhardt enjoys hunting, recreation, the outdoors and fishing.

Rifle is located in Garfield County, an area where about 60 percent of the lands are federal public lands. Rifle was founded as a ranching community along the Colorado River and retains that heritage today, along with tremendous opportunities for outdoor recreation, including fishing, hiking, skiing, rafting and rock climbing. It also sits at the edge of the Piceance Basin, an area in Colorado that has vast amounts of natural gas.

Mr. Bernhardt grew up in the oil shale boom and bust and has said that that boom and bust, "has made him more sensitive to the potential impacts and benefits, both environmental and social, of our public lands."

In the 1980's Rifle was hit by the state's oil shale crash, and he personally experienced some of the hard times the nation's rural communities often faced.

Much like the Department of the Interior itself, Rifle is a community that is a product of its public lands and Western heritage. Rifle is centrally located within a few miles of the iconic Grand Mesa, which is the world's largest flat-topped mountain, the flat top wilderness and the Roan plateau. It represents a home base among these public lands with virtually unmatched access to world class outdoor experiences, which is why David has such a passion for these issues.

His background and outlook on public lands and water issues assisted him in his prior service at the Department, including in the Solicitor's role. David's confirmation as Solicitor was confirmed by voice vote by the U.S. Senate in 2006.

There have been other nominees considered by the Committee who practiced private law before and between public service appointments at the Department of the Interior, including during the Obama Administration. David is taking the same steps these nominees did in order for his nomination to move forward today. Mr. Bernhardt's integrity and ability are two of his strongest qualifications for this nomination.

Public service requires certain sacrifices, and I appreciate that David and his family's acceptance of this nomination are to be considered by this Committee today. I hope that the confirmation process has not become a broken process that disincentivizes qualified people, such as David, who are held in high professional regard from returning to public service.

As the Committee takes up his nomination, I urge my colleagues to hold this nominee to the same practice and to the same process that we hold all nominees that are under consideration from this Committee.

I look forward to Mr. Bernhardt's testimony and thank the Committee for considering him today.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Gardner. I appreciate your statement and the introduction of Mr. Bernhardt and his qualifications, as well as a reminder to us all that the nomination process is one that we take quite seriously. We have been waiting anxiously to have this new Administration's nominees come before the Committee. Making sure there is a consistency in application of standards, of course, is something that we would all encourage, support and request.

So again, we are here this morning to consider the nomination of David Bernhardt as Deputy Secretary of the Interior.

Senator Gardner mentioned this position is akin to being the Chief Operating Officer. The individual who holds this position is responsible for executing strategy and overseeing the initiatives undertaken by thousands of employees as they carry out their statutory duties and the Administration's agenda.

I believe that Mr. Bernhardt is an excellent choice for Deputy Secretary. He is a fellow Westerner, as we heard, hailing from a small town in Colorado. He understands the management of federal lands and how it affects those who live near them, the implication of federal policies and the need for balance between conservation and development. He is an avid sportsman. He understands the balance.

Mr. Bernhardt is already well known to many of us. He has extensive experience at the Department of the Interior, including several years as its Solicitor, a position, again, as noted by Senator Gardner, for which he was favorably reported from our Committee and confirmed by the Senate by a voice vote.

Throughout his time at Interior, Mr. Bernhardt gained significant expertise about a range of Western issues and Alaska issues. After meeting with him last week again and, kind of, renewing our

acquaintance there, I remain confident with how he understands the importance of Alaska to the Department and how consequential the Department's decisions are to my state.

Now I think we will let Mr. Bernhardt speak further to his biography, and give an opportunity to introduce his family. I, too, welcome the family and thank you for your willingness to serve in this manner because we all recognize that it is not just those who hold the office, but their families that sometimes bear the weight of the office because they don't see their family.

I will just further add that Mr. Bernhardt is knowledgeable about the issues that face the Department and the predominantly Western lands it manages. He has a strong reputation as a manager which is critical for a Deputy Secretary, and his nomination is being supported by dozens of groups including sportsmen's groups, Ducks Unlimited, Safari Club, Teddy Roosevelt Conservation Partnership.

For members who have questions for Mr. Bernhardt, this is the time, this is the place, to ask them.

I know that many of us have had an opportunity to visit prior to this hearing, but I intend to be here this morning for as long as it takes members to ask their questions. They will also have the normal opportunity to submit questions for the record and those questions will be due at the close of business today.

So again, Mr. Bernhardt, I want to thank you for your willingness to serve, and your family's willingness. I think we all understand how difficult and contentious just the process is that we are dealing with right now, but know that it is my intention to try to move your confirmation as expeditiously as possible.

With that, I turn to Senator Cantwell for her opening comments.

**STATEMENT OF HON. MARIA CANTWELL,  
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Madam Chair, and welcome to the nominee and to his family for being here today. This is an important hearing and these issues are very important for the entire nation.

The Deputy Secretary, in supervising and administering the Department, performs important functions of the Secretary in the Secretary's absence. In virtually all matters the Deputy has the full authority of the Secretary. That is why it's critical today to have a full review of the nominee and his past positions on important matters that he will be responsible for.

I have to say at the outset that I have concerns about Mr. Bernhardt's nomination. Certainly, he is no stranger to the Department of the Interior, and he is no stranger to our Committee. He held a number of senior political positions in the Department during the Bush Administration, including the Department's Solicitor, beginning in 2006.

Since leaving the Department in 2009, Mr. Bernhardt has had a very successful private sector law practice. He has represented a wide range of clients, including oil and gas companies, mining companies and water supply interests in California, just to name a few. And he has previously been tasked with helping to oversee these same companies while at the Department of the Interior.

Mr. Bernhardt is now seeking to come back through this revolving door and be part of regulating and overseeing the same issues that he was lobbying for in the private sector.

I am not suggesting that working for the private sector disqualifies someone from the public sector, but I am reminded of the various nominees before this Committee and the various issues that my colleagues have brought up during the Obama Administration. I don't think they are going to be the ones we are bringing up today.

For example, the Committee rejected nominees during the Obama Administration for simply having worked for a national environmental group, having served on the board of an environmental group, and in one case, simply being a vegetarian.

Those objections for disqualifying the nominee were patently absurd, and they remain so today. But because of the extensive background Mr. Bernhardt has had in the private sector, these issues of conflict of interest or appearance of conflict of interest will be the subject of my questions today.

His ethics agreements say he will not participate in particular matters involving specific parties in which his firm is a party or represents a party, and I will have questions for him on that. But these ethic rules only require him to recuse himself for one year; or two years, if he adheres to the Trump Administration pledge.

Mr. Bernhardt has had considerable experience working with the Department from his service during the Bush Administration, as Counselor to the Secretary, Director of Congressional and Legislative Affairs, Deputy Chief of Staff, Deputy Solicitor, and Solicitor. And he has a great deal of experience from his law practice, representing energy, mining, and water clients. But his work for those clients also poses a problem. It creates at least an inherent appearance of conflict, and today we are going to talk about some of that.

Why is this important? Well, in the Reagan and Bush Administrations, James Watt, Gale Norton, who was investigated for giving preferential treatment to Shell and later taking a job with Shell, and Steven Griles, who was investigated for conflict of interest and went to prison for obstructing a Senate investigation, all came to the Department of the Interior after representing energy and natural resource clients.

In their confirmation hearings, they came before the Committee and assured us that they would successfully switch sides and disassociate themselves from these former clients. But their outlook, their frame of reference, the policies they pursued remained the same as those they had advocated for their former clients. These were the policies aimed at monetizing the values of American natural resources and public lands for the benefits of corporation and the expense of taxpayers. These are important issues that we want to address today.

It took fewer than 100 days of the Trump Administration for the new Secretary to start rolling back important land conservation measures. To simply say to us, don't worry today, is not going to suffice.

Mr. Bernhardt's nomination raises further questions because his prior service at the Department of the Interior came at a time when the agency faced legal scrutiny over its ethics failings. He

was the Department's top legal officer at the time the Department's Inspector General described it as "having a culture of ethical failure."

In September 2006, just before the Senate confirmed Mr. Bernhardt as the Solicitor but after he had been serving five years in a senior position, including as Deputy Solicitor, the Inspector General testified before a House Committee, "Simply stated, short of a crime, anything goes at the highest level of the Department of the Interior. Ethics failures on the part of senior department officials—taking the form of appearances of impropriety, favoritism and bias—have been routinely dismissed with a promise of not to do it again."

Both Secretary Norton and Deputy Secretary Griles were investigated for those conflict of interests. And as I said, Deputy Secretary Griles was ultimately convicted and went to prison for obstructing the Senate Indian Affairs Committee investigation of the Jack Abramoff scandal.

Julie McDonald, an Assistant Secretary in the Department, was forced to resign. She was found to have given internal agency documents to industry lobbyists, pressured agency scientists to withhold information, and improperly modified scientific data to further her agenda against the Endangered Species Act.

Drug use, misconduct between agency staff and industry, rampant conflicts of interest were prevalent in the Mineral Management Services. I am not saying all of this happened during his watch, but certainly these were the things that occurred. So I have questions about tackling those issues.

The lack of enforcement and oversight attitudes ultimately led to the complete restructuring of the Mineral Management Service. Mr. Bernhardt was a senior political leader in the Department during many of these events. He counseled the Secretary and served as the Deputy Chief of Staff or top legal officer during this time.

Given this role I hope he will be able to shed light on the extent of his role in some of these matters and what further reforms we need. Specifically, the issue of conflict of interest will be something that I plan to ask about, Madam Chair, during the Q and A because Mr. Bernhardt has represented Cadiz, a company which is seeking to pump groundwater near the Mohave National Preserve in Southern California to sell it elsewhere. His law firm has a unique compensation arrangement. I find it interesting that upon taking office, the Trump Administration quickly reversed the previous Administration's opposition to this project.

So we want to understand Mr. Bernhardt's clients, his partners, and what their financial benefits are from this project. We do know that the LA Business Journal reported earlier this month that Cadiz was able to raise \$255 million in private equity investment premised on the Trump Administration approval.

So again, these issues of clients and past issues at the agency will be the subject of many of our questions. I do have a longer statement that I am going to enter into the record about other issues of concern that we just don't have time at this point to go over. But clearly his work on behalf of the Westland's irrigation district, in addition, serving as the lead attorney for the State of Alaska's lawsuit challenging the Department of the Interior's man-

agement of the Arctic Wildlife Refuge and litigation, and lobbying on behalf of Taylor Energy which operates a well that has been leaking into the Gulf of Mexico since 2004.

I am very interested to have the explanation on this previous tenure at Interior and avoidance of conflict of interest on many of these issues that I have just raised. I think the Department of the Interior should be the guardian of public interest when it comes to stewardship of our public lands and our natural resources. So I look forward to hearing the nominee talk about those issues and being able to ask questions.

Thank you, Madam Chair.

[The written statement of Senator Cantwell follows:]

**Ranking Member Maria Cantwell  
Opening Statement  
David Bernhardt Nomination Hearing  
Thursday, May 18, 2017**

The confirmation of the Deputy Secretary of the Interior is every bit as important as the confirmation of the Secretary himself. The Deputy assists the Secretary in supervising and administering the Department. He performs all the functions of the Secretary in the Secretary's absence. In virtually all matters, the Deputy has the full authority of the Secretary.

That's why it is critical that this Committee do its job in fully reviewing any nomination for this important post.

But I have to say at the outset that I have grave concerns about this nomination.

**Conflicts of Interest**

Mr. Bernhardt is no stranger to the Department of the Interior, or to this Committee.

He held a number of senior political positions in the Department during the scandal-plagued Bush Administration, including as the Department's Solicitor beginning in 2006.

Since leaving the Department in January 2009, Mr. Bernhardt has returned to a very successful and lucrative lobbying practice.

He has represented a wide range of clients: oil and gas companies, mining companies, and water supply interests in California, to name just a few.

Mr. Bernhardt was previously tasked with helping to oversee these same companies while at the Department of the Interior. Now, Mr. Bernhardt is asking us for permission to walk back through that revolving door once again.

To be clear: I am not suggesting that working for private industry alone disqualifies someone from public service. Not at all. But I am reminded of the positions some of my colleagues took during the Obama Administration.



Certain nominees before this Committee were rejected for supposedly outrageous offenses ranging from:

- working for a national environmental group; to
- serving on an advisory board; to
- Simply admitting to being mostly a vegetarian.

Those objections for disqualifying a nominee were patently absurd then, and they remain so to this day.

Because of his extensive background as a lobbyist, Mr. Bernhardt has so many conflicts of interest, or the appearance of conflicts, that there will be one of two outcomes.

- One, he will simply be unable to perform his duties as deputy secretary. That's because he will need to be recused from such a broad swath of the Department's issues. Today, we do not even understand the full scope of those issues.

His ethics agreement says he will not participate in "particular matters involving specific parties" in which his "firm is a party or represents a party." But which matters? Which parties?

- Or two, he will manage the Interior Department *despite* his clear conflicts of interest, and he will end up participating in matters involving his former firm or his former clients.

Neither option is acceptable.

Moreover, the ethics rules only require him to recuse himself for two years, not the full length of his service.

Mr. Bernhardt has considerable experience with the work of the Department both from his service during the Bush Administration—

- as Counselor to the Secretary;
- as Director of Congressional and Legislative Affairs;
- as Deputy Chief of Staff;
- as Deputy Solicitor

- and as Solicitor—

and from his private practice as a lawyer and lobbyist for energy, mining, and water clients.

But his work for his clients also poses a serious problem. It creates an inherent tension—or in the very least, an appearance of conflict—between the interests of his clients and the public interest the Department must serve and protect.

In the Reagan and Bush Administrations—James Watt, Gale Norton (who was investigated for allegedly giving preferential treatment to Shell and later taking a job with Shell), and Steve Griles (who was investigated for conflicts of interest and went to prison for obstructing a Senate investigation)—all came to the Department of the Interior after representing energy and natural resource clients.

In their confirmation hearings they came before this Committee and assured us they could successfully “switch sides” and disassociate from their former clients.

But their outlook, their frame of reference, the policies they pursued remained the same as those they had advocated on behalf of their clients.

These were policies aimed at monetizing the value of America’s natural resources and public lands—for the benefit of corporate profits, and at the expense of today’s taxpayers and future generations of Americans.

Already we have seen Secretary Zinke promise at his confirmation hearing to manage the Department in the model of Teddy Roosevelt.

Once confirmed, we’ve watched him launch an unprecedented war on our public lands and national monuments. What’s happened already during the Trump Administration likely has Teddy rolling over in his grave.

It took fewer than 100 days of Trump to attack almost 111 years of land conservation.

So, asking us now not to worry—to simply trust that recusal and conflict issues will be resolved—is not going to cut it. We need answers and additional specificity on how these policy and client matters will be handled.

**The Bush-Norton Era**

Mr. Bernhardt's nomination raises the further concern that his prior service at Interior came during an era that was far from the Department's finest hour.

He was the Department's top legal officer at the time the Department's Inspector General described it as having a "culture of ethical failure."

In September 2006, just before the Senate confirmed Mr. Bernhardt as the Solicitor, but after he had been serving 5 years in senior positions, including as Deputy Solicitor, the Inspector General testified before a House committee that—

"Simply stated, short of a crime, anything goes at the highest levels of the Department of the Interior.

"Ethics failures on the part of senior department officials — taking the form of appearances of impropriety, favoritism and bias — have been routinely dismissed with a promise 'not to do it again.'"

Both Secretary Norton and Deputy Secretary Griles were investigated for conflicts of interest.

Deputy Secretary Griles was ultimately convicted and went to prison for obstructing the Senate Indian Affairs Committee's investigation of the Jack Abramoff scandal.

Julie MacDonald, an Assistant Secretary in the Department, was forced to resign.

She was found to have given internal agency documents to industry lobbyists, pressured agency scientists to withhold information, and improperly modified scientific data to further her agenda against the Endangered Species Act.

Drug use and misconduct between agency and industry staff, and rampant conflicts of interest were prevalent in the Mineral Management Service.

The lax enforcement and oversight attitudes ultimately led to the complete restructuring of the agency.

Mr. Bernhardt was in senior political leadership positions at the Interior Department for many of these events.

He counseled the Secretary or served as her Deputy Chief of Staff or as the Department's top legal officer throughout this period.

Given his role in senior leadership throughout this time, I hope Mr. Bernhardt will be able to shed some light on the extent of his role in some of these matters—how much he knew about them at the time and what, if anything, he did about them.

In light of all these concerns, I would hope Mr. Bernhardt appreciates the need for a higher degree of transparency.

This is especially the case when it comes to managing the many conflicts of interest that arise from his large book of lobbying clients.

For example, Mr. Bernhardt has represented the Cadiz company, which is seeking to pump groundwater near the Mojave National Preserve in Southern California, to sell it elsewhere.

His law firm has a unique compensation arrangement where the firm owns 200,000 shares of Cadiz stock and stands to realize additional compensation if certain milestones are met.

Upon taking office, the Trump Administration quickly reversed the previous administration's opposition to the project. At this time, we do not know whether this has anything to do with Mr. Bernhardt's lobbying for the project.

We do not know if it has anything to do with the role he played on the Trump Transition Team—or possibly both.

But we do know Mr. Bernhardt's clients and partners will receive major financial benefits if the Interior Department continues to green light this very controversial project. And we do know that the *LA Business Journal* reported earlier this month that Cadiz was able to raise \$255 million in private equity investment, premised on Trump Administration approval.

Again, as Deputy Secretary, Mr. Bernhardt will likely supervise Interior's role in this project in a day-to-day capacity. There are many, many, other examples. These examples include his work on behalf of the Westlands Irrigation District.

Westlands has been involved in very contentious litigation and lobbying against the Department's policies in the ongoing California water wars.

It includes serving as the lead attorney for the State of Alaska's lawsuit, challenging the Department of Interior over its management of the Arctic National Wildlife Refuge.

It includes litigation and lobbying on behalf of Taylor Energy. Taylor operates a well that has been leaking oil into the Gulf of Mexico since 2004—and has tried to avoid clean-up obligations.

So today, I will be very interested to hear Mr. Bernhardt's explanation of his previous tenure at the Interior Department and how he intends to avoid the conflicts of interest--or appearance of conflicts--from his many clients with business before the agency.

The Department of Interior is the guardian of the public interest when it comes to stewardship of our public lands and natural resources.

The American public deserves sufficient information and transparency in the dealings of the Department's leadership, to have confidence that taxpayers' interests will be protected—rather than monetized for the benefit of a revolving door cast of polluters and corporate interests.

Thank you.

The CHAIRMAN. Thank you, Senator Cantwell, and we look forward to your questions, as well as those from all members of the Committee, questions about Mr. Bernhardt's or any nominees' potential conflicts and the needs for associated recusal are fair and important.

For my part, I have asked many of those questions of the nominee, and I have been satisfied with his answers. I take the designated agency ethics official at the Department, in addition to the General Counsel at the Office of Government Ethics, at their word that Mr. Bernhardt meets all of the ethical standards under the law for nominees. They have attested to this in writing and in the paperwork that has been submitted that we all have.

So, again, fair and important to ask these questions, but again, I want to make sure that what we are doing here in this Committee is consistent with what we have done previously in terms of the standards that we set.

Mr. Bernhardt, if you would like to come forward, please, and we will administer the oath as we do with each nominee before the Committee. The rules of the Committee, which apply to all nominees, require that they be sworn in in connection with their testimony. Please raise your right hand. Do you solemnly swear that the testimony you are about to give to the Senate Committee on Energy and Natural Resources shall be the truth, the whole truth and nothing but the truth?

Mr. BERNHARDT. Yes.

The CHAIRMAN. Before you begin your statement I will—you can go ahead and sit here. I will ask you three questions addressed to each nominee before this Committee.

First, will you be available to appear before this Committee and other Congressional Committees to represent Departmental positions and respond to issues of concern to the Congress?

Mr. BERNHARDT. Yes.

The CHAIRMAN. Second, are you aware of any personal holdings, investments or interests that could constitute a conflict or create an appearance of such a conflict, should you be confirmed and assume the office to which you have been nominated by the President?

Mr. BERNHARDT. No.

The CHAIRMAN. And are you involved or do you have any assets held in blind trust?

Mr. BERNHARDT. No.

The CHAIRMAN. With that, Mr. Bernhardt, you may proceed. We would certainly encourage you to introduce your family to the Committee, but we look forward to your comments here this morning and the opportunity to ask questions.

#### **STATEMENT OF DAVID BERNHARDT, NOMINATED TO BE THE DEPUTY SECRETARY OF THE INTERIOR**

Mr. BERNHARDT. Well, thank you, Chairman Murkowski, Senator Cantwell, members of the Committee. I request that my written statement be entered into the record, and I will summarize my remarks.

The CHAIRMAN. It will be included as part of the record.

Mr. BERNHARDT. I am humbled to appear here today as President Trump's nominee for the position of Deputy Secretary for the Department of the Interior. I deeply appreciate the trust and confidence Secretary Zinke has placed in me by asking me to serve as his Chief Operating Officer of the Department, and I ask for your consent to that nomination.

I am joined this morning by members of my family. My wife, Gena; my son, William; my daughter, Katherine; and my mother from Colorado, Carolyn Bernhardt-Jones.

Now last week when Will and Katie were told about the hearing and that it would take place this morning, they wanted to attend because it beat the classroom.

[Laughter.]

That actually was only for a few moments, and then I informed them that they wouldn't be texting during the Committee's proceeding.

[Laughter.]

But after searching the web they decided their dad could use some backup, and for Will there's an additional bonus because we think his attendance counts toward meeting the requirement for a Citizenship of the Nation merit badge for scouts.

It was quite an experience to be introduced by Senator Gardner. Our paths have crossed in interesting ways. He is a great leader for the State of Colorado, and I am deeply grateful for his support and introduction.

Senator Gardner mentioned a man named Russell George, who was only one of many individuals who greatly impacted my interest in natural resource and environmental matters as well as my development as a leader.

My interest and dedication to working in natural resources was originally driven by family trips to majestic parks, boating in Glen Canyon National Recreation Area and hikes and hunts and horseback rides on the public lands that border Rifle, Colorado.

But it was also driven by daycare. I didn't realize it would be a theme for today's hearing, but it was driven by daycare. And here's why. My parents both worked, and as a result they took an unconventional approach to daycare. My dad would take my brother and I everywhere. And when I say everywhere, I mean everywhere.

As a result, my earliest memories are of attending local water district, fair board meetings, soil conservation meetings within the County of Garfield County. The discussion of many of those meetings centered around two things: water and what was taking place on public lands. That's what people talk about in Western Colorado.

Now I thought the farmers, ranchers and other folks who volunteered their time to participate in these meetings were doing very important work. I also saw that they actually got things done. Needed facilities were actually built. Where there were disagreements, they took place with civil discussion.

At times they thought their federal neighbors were helpful and at others, far less so. Their actions toward working to a common purpose improving things in Garfield County were, in my mind at the time as a child, the embodiment of the 4H pledge where it con-

tains the phrase, "I pledge my hands for a larger service to my club, my community and my world."

Now, not everything was sunshine in Rifle, as Senator Gardner mentioned. It suffered a dramatic economic downturn in the mid-80's that was driven partially or significantly by changing economic dynamics but it was also driven by changing federal policies. The Federal Government eliminated the so-called synfuels program which had created an incentive for oil shale.

One consequence of that downturn, at least for me, was a sense of economic hopelessness and I left high school a year early to get out of Rifle. When I left I carried with me a commitment to that 4H pledge that we should strive to serve our community, our state and our country in some capacity. I carry that with me today as I sit here with you, and I've carried it with me every day of my life.

For me, there are few missions as important as those of the Department of the Interior. It is obvious to anyone watching their kids take in the Statue of Liberty for the first time why we protect our cultural icons for generations. It's also obvious to my kids, every time we open the freezer and they say, please, not elk again.

[Laughter.]

Why we treasure access to our public lands and are guided by the North American model of wildlife conservation.

During my career I have worked on complex issues affecting each of the Department's bureaus. I understand each bureau's mission. I know the dedication of the people there, and I respect the legal and policy choices facing decisionmakers.

If I am confirmed here is the approach that I will take when addressing the Department's challenges: I will approach them with an open mind; I will actively seek input and listen to varied views and perspectives; the recommendations I make to the Secretary or those I personally draw will be informed; the decisions I make will be within the confines of the discretion you, as Congress, have given the Secretary in the law; and, the decisions I make will be made with integrity.

Thank you and I look forward to your questions.

[The prepared statement of Mr. Bernhardt follows:]



Statement of David Longly Bernhardt  
Nominee for the Position of Deputy Secretary of the Department of the Interior  
Before the Committee on Energy and Natural Resources  
United States Senate

May 18, 2017

Chairman Murkowski, Senator Cantwell, and Members of the Committee, I am humbled to appear here today as President Trump's nominee for the position of Deputy Secretary of the Department of the Interior.

I deeply appreciate the trust Secretary Zinke has placed in me by asking me to serve as the Chief Operating Officer of the Department, which is the role of the Deputy Secretary. I ask for your consent to the President's nomination.

I am joined this morning by members of my family: my wife Gena, my son William, my daughter Katherine, as well as my mother Carolyn Bernhardt-Jones. Last week, when Will and Katie were told that this hearing would take place today they wanted to attend claiming that it beat a day in the classroom. That was until they learned they would not be texting during the Committee's proceedings, which made the choice between the hearing and class a very close call. But they are troopers and wanted to be here. For Will there is added bonus, because we think his attendance counts in meeting a requirement for his Citizenship in the Nation merit badge.

It was quite an experience to be introduced by Senator Gardner because our paths have crossed in interesting ways. Obviously, he is a great leader for the State of Colorado. As he mentioned, we both grew up in rural Colorado. I am from the outskirts of the town of Rifle, in Garfield County, Colorado. That county is made up of about two million acres, ranging from rugged alpine mountains to high desert plateaus. About sixty percent of the county is public land, most administered by the Bureau of Land Management and the Forest Service.

Senator Gardner mentioned a man named Russell George. Russell is an educator at heart and he challenged me to understand the history of the development of the law, particularly as it related to water, to be respectful of differing views, and by his example to recognize and engage in principled leadership. He also served as a guide for me as I developed my private law practice in which I have represented non-profits, Indian tribes, water districts, small businesses, and fortune 500 companies. Russell was only one of many individuals who greatly impacted my interest in natural resource and environmental matters, and my development as a leader.

My interest in and dedication to working in natural resources was originally driven by family trips to majestic National Parks, boating at Glen Canyon National Recreation Area, and hikes, hunts and horseback rides on the public lands that bordered our community, when my brother and I weren't on my grandparents ranch in eastern Wyoming. It was also driven by daycare, or the lack thereof. Yes, I said daycare.

My parents both worked and, as a result, they took an unconventional approach to daycare. My dad would take my brother and me everywhere, and I mean everywhere. If we weren't in school and my mom was working, we were with our dad doing whatever he was doing. As a result, some of my earliest memories are of attending local water district or soil conservation district meetings.

In the truck ride home from those meetings, I would pepper dad with questions about the discussions I had heard. Most of the discussions in those meetings centered around two things: water and activities that were taking place on the public lands that surrounded us and were important to Garfield County's economy.

As a kid, I did not always understand the issues discussed, but I thought the small business owners, farmers, and ranchers who volunteered their time to participate in these meetings were doing very important work. I also saw that they actually got things done. Needed facilities were built. Decisions were made. The community moved forward. Where there were disagreements, they took place with civil discussion. At times they viewed their federal neighbors as helpful, and at other times far less so.

Of course, their work was no more important than the multitude of meetings that take place every day by dedicated citizens throughout this country. But their actions, working toward the common purpose of improving things in Garfield County, were in my mind the embodiment of the 4-H pledge which includes the phrase: "I pledge my hands to larger service for my club, community, country, and world."

Now not everything in Rifle was sunshine. It was the self-proclaimed "Oil Shale Capital of the World," and suffered a dramatic economic downturn during the mid-1980s energy bust. Changing economic realities and changing federal priorities impacted both individuals and the community as a whole for years. One of those impacts, at least for me, was a sense of dread that no one, except those struggling in Garfield County, cared about its fate. That feeling was powerful. It led me to leave high school a year early to get away.

When I left, I carried with me the belief that all of us should strive to serve our community, state, or our country in some capacity; I carry it with me today as I sit before you. It is how I have lived my life.

For me, there are few missions as important as the varied missions of the Department of the Interior. It is obvious to anyone watching their kids take in the Statue of Liberty for the first time, why we protect our cultural icons for future generations. It is obvious to anyone who witnessed the efforts of the longtime leader of the Southern Ute Tribe, former Chairman Leonard C. Burch, and a water lawyer named Frank E. "Sam" Maynes to secure a water right settlement that amounted to something other than a paper water right, like occurred through the Colorado Ute Settlement Act amendments, the benefits that flow to entire communities by resolving seemingly intractable conflicts for scarce resources. And it's obvious to anyone who has shown up in Rifle Colorado during hunting season to have a chance at bagging a mule deer why access to and

maintenance of public lands is important. It's obvious to my kids every time Gena or I open the freezer and they say, please "no elk for dinner!"

Over the course of my career, I have had an opportunity to work on many complex issues affecting each of the Department of the Interior's bureaus. I understand each bureau's mission. I appreciate their history. I know the dedication of people who work at the Department. I respect the often conflicting legal and policy issues likely facing the decision-makers within the Department.

When addressing the Department's challenges I will approach them with an open mind, actively seeking input and listening to varied views and perspectives. I will ensure that the recommendations I make to the Secretary, or conclusions I draw as the Department's Chief Operating Officer, are well-informed. I took that approach as Solicitor.

When I entered the Office of the Solicitor, morale was low and the Office was facing unmet challenges. There was no real record system for the Office. Because of a long-pending lawsuit, it had been disconnected from the internet and the Department's bureaus for years. Looking at it, I was determined to improve management decisions and to establish protocols and practices that better served the public and the employees within the Office.

To do so, I carefully set our priorities to specifically address the needs of the Secretary and to improve the technological, human capital and organizational resources of the Office. After our priorities were established, I followed through with my commitment to address them. As a result, both morale and service to the public improved. I intend to bring the same determination and dedication to ensuring that the Department better serves the public and its employees.

Here are a few concrete organizational steps that I took as Solicitor. I significantly expanded the capabilities of the Department's Ethics Office. I re-organized the provision of legal services on royalty matters so that those providing counsel to the then-Minerals Management Service were more accessible to their clients. I tested different methods of better integrating attorneys into project teams in an effort to develop more defensible agency decisions. I substantially improved the organizational interaction between the Office of the Solicitor and the Office of the Inspector General. I prioritized financial resources to enhance training.

I also improved the way the Office managed information and its ability to share knowledge between regions and divisions. When I first entered the Office of the Solicitor, it was virtually impossible to obtain a quantitative analysis of its workload. When I left it could be done with the keystroke of a computer.

In addition to making these organizational changes, I did not shirk from addressing the tough legal questions. When the Department was consistently failing in its defense of certain decisions in particular areas of the law, I chose to evaluate why and explore with the bureaus alternative approaches for future decisions or policies. I listened to the lawyers in the trenches before rendering an opinion. I did this because I knew their insights were valuable. I delivered advice to the Secretary or the Deputy Secretary that was based upon my understanding of the parameters of the law as it existed, not what I wished the law said.

At his confirmation hearing before this Committee, Secretary Zinke described three immediate tasks for the Department: restoring trust by working with, rather than against, local communities and states; prioritizing the maintenance backlog of the National Parks; and ensuring that the professionals on the front lines have the right tools, resources and flexibility to make the right decisions, giving a voice to the people they serve. Anyone that has met him since he assumed command of the Department knows he is focused on these tasks.

In a short period of time, Secretary Zinke has decisively initiated efforts to advance conservation stewardship, improve game and habitat management, and increase outdoor recreation. He has issued directives intended to put America on track to achieve the President's vision for energy independence and to bring jobs back to communities across the country.

His principles for reforming the Department are straightforward and clear: empower the front lines; cut the waste, fraud and abuse; hold people accountable; make efficient use of limited resources and make investments where necessary and important. I look forward to the opportunity to serve with him.

If confirmed, I will do everything I can to promote President Trump's and Secretary Zinke's goals for the Department of the Interior. I will do so within the confines of the lawful discretion that the Congress has given the Secretary. I will do so with dedication and integrity upholding the public trust.

Thank you and I look forward to your questions.

The CHAIRMAN. Thank you, Mr. Bernhardt.

We now will turn to five-minute rounds of questions from members.

Mr. Bernhardt, my first round here will be, perhaps, more parochial than my colleagues here, but I want to speak to some of the Alaska-specific issues.

If you are confirmed, we have had the discussion about the extent of the role that Alaska plays within Department of the Interior. We oftentimes refer to the Department as our landlord, given the scope and reach into our internal affairs.

It is no secret around here that with the last Administration I did not have a particularly close or productive relationship with the Department of the Interior which was unfortunate.

So, a general question to you this morning, is how will you approach the dealings with the State of Alaska? How will that be different from what we saw with the previous Administration?

Mr. BERNHARDT. Well, first let me say that I love the State of Alaska.

The CHAIRMAN. Thank you.

Mr. BERNHARDT. My wife and I have been at Katmai National Park which I think is one of the most incredible parks on the planet. I've hunted in Yukon Charlie Preserve and been to Denali.

In terms of a changed perspective, I think Secretary Zinke has already set that tone by saying that this would be an Administration that restores trust. And I believe that when he says that, he means that we will cooperate and collaborate with states and be respectful of their appropriate role in management and stewardship and with tribes.

And from my own perspective I would tell you this, that I'm a student of history and I know and appreciate the agreements that the people in the State of Alaska believe were made by this Congress for them and the balance that those statutes were designed to create and to the extent that we decide that that balance is out of kilter, we'll work with you to restore the balance and the trust.

The CHAIRMAN. Well, we appreciate that because we feel that there have been many promises made, whether at statehood or following statehood, as it related to our lands and to the promises made to our native people.

Mr. BERNHARDT. Right.

The CHAIRMAN. In that vein, you mentioned the commitment to work with our tribes, and I am pleased that you are emphasizing that because the obligation to uphold the Federal Government's trust responsibility to our first peoples is a significant one and throughout the country. But recognizing that we have had issues relating to consultation with our native people, whether in the State of Alaska, I know, again, many of the commitments that were made under ANSCA, many believe have not been kept. There are groups, like the Bering Sea Elders, who believe the Federal Government has not done a good job of consultation in the past.

So I am asking for your commitment to, not only conduct consultation, I don't want check the box consultation. We need to have meaningful and consistent consultation with our tribes, with our native organizations, not only in Alaska, but around the country

and really to involve them appropriately in the decisions being made that are relevant to them.

Mr. BERNHARDT. Well, I certainly will give you that commitment.

I am fortunate in that yesterday I received a letter from the Southern Ute Tribe which is a tribe in Colorado that used to be led by a gentleman named Leonard Birch. And I had the good fortune of working with Chairman Leonard Birch and others to learn just how meaningful good tribal leadership can be to communities and they supported my nomination, expressed that I have a history of listening and working with them. And of all the things that I've received, other than Senator Gardner's introduction, that really hit home for me. I mentioned it in my testimony and it's something that I believe in.

I spent years working on Indian water right settlements, resolving conflicts whether they were in Colorado, New Mexico or Arizona, and I'm committed to hearing people out and trying to find real solutions and to the extent that we can solve things doing it.

At the end of the day that's what we're going to be judged on, what we did. Did we adopt practical solutions? Did we move the ball forward? Because I think at times we're paralyzed in the Federal Government and we just need to step forward and make things happen.

The CHAIRMAN. Thank you.

Senator Cantwell.

Senator CANTWELL. Madam Chair, I was wondering if I could defer to my colleague, Senator Heinrich, because I need to run and vote in the Finance Committee and come back, if I could do that?

The CHAIRMAN. Certainly. Senator Heinrich is next.

Senator CANTWELL. Is that imposing on you too much, Senator Heinrich?

Senator HEINRICH. Not at all.

Senator CANTWELL. Thank you.

The CHAIRMAN. Okay.

Senator Heinrich.

Senator HEINRICH. Thank you, Madam Chair.

Mr. Bernhardt, I wanted to start out and ask you a question about the recent action by President Trump that he took with regard to the signing statement when he signed and enacted the FY2017 Omnibus Appropriations bill.

There was the implication that some programs and services for American Indians and for tribes may not comply with equal protection clause of the Constitution. Do you hold the view that tribal programs are somehow in conflict with the equal protection clause of the Constitution?

Mr. BERNHARDT. Well Senator, first off I must say I have no knowledge of the signing statement and if you want to provide it to me, I'd be happy to look at it.

Senator HEINRICH. We would be happy to do that, but I think generally as a matter you not need be familiar with the—

Mr. BERNHARDT. Sure.

As a general matter there is a long history of Federal Courts upholding perspectives related to your plenary authority and the relationship with tribes, so I'm really at a loss to speak to that particular matter. But I'd say that the courts have sustained a variety

of programs that have been lawfully enacted here and so, I just apologize for not being able to respond more deeply.

Senator HEINRICH. So you know, let me give you an example of one of the list of different programs that were called out with respect to the signing statement.

One of them was Native American housing block grants, for example. I am not sure what the logic was, but I just want to get a sense for that you do not have an inherent concern about an inherent conflict and that you are comfortable with where the courts have ruled over the years on that matter.

Mr. BERNHARDT. Well, what I would say is I have no knowledge of that particular item. For example, some of those programs, or that particular program, it's my understanding, has been in place for quite a while. So, I can't really speak to the challenge.

Senator HEINRICH. During your previous tenure at the Department there was a multiple years long, what I would call a, sort of, a de facto moratorium on land-into-trust applications. More recently in the last Administration I think we saw them take approximately, yes, half a million acres into trust on behalf of tribes.

One of the things that we have heard more recently is that there are concerns that there are plans in the works at the Department of the Interior, again, to change the land-into-trust process and potentially to do so without first consulting with tribes. Are you comfortable committing to conducting a full tribal consultation before making any major changes to the land-into-trust process?

Mr. BERNHARDT. Well, fortunately we had a little bit of an opportunity to speak yesterday, and I think in that meeting I explained to you that from my perspective one of the great opportunities of the Trump Administration and its relationship with tribes is that Congress has resolved some of the long-standing Indian trust issues related to Cobell and other things.

And I think that anything that happened during the Bush Administration regarding land-into-trust and trust responsibility, I don't think you can look at those things without sharing a perspective of that particular litigation and the burdens that were imposed on the Department of the Interior because of it.

So I'm excited about having a new slate to start with, if you will, not covered by the legacy of hundreds of years, or a hundred years.

I can't speak to what the Department has suggested because I'm not aware of any changes. What I would say is to the extent that it would be a regulatory change, there would absolutely be public comment opportunity. And I would think that if it's anything that's meaningful, we would absolutely participate in some form of engagement.

Senator HEINRICH. Great.

Madam Chair, I am going to hold the rest of my questions for the second round and let you get to some other members.

Thank you.

Mr. BERNHARDT. Thank you, Senator.

The CHAIRMAN. Thank you, Senator Heinrich.

Senator Barrasso.

Senator BARRASSO. Well, thank you, Madam Chairman.

Congratulations again on your nomination. It is clear to me that you are keenly aware that this Administration does not want to

continue the old business as usual at the Department of the Interior. In fact, it must not be business as usual. You know, across the West communities are struggling with real, dramatic, over regulation that we have been living with the last eight years.

Federal agencies have repeatedly failed to recognize on the ground realities that were caused by broad, over-reaching federal policies. Over regulations, particularly harmful, in my home state of Wyoming, where nearly half of our state is public land managed by the Department of the Interior.

We live and we work and we play on these public lands, so it is critical to states like Wyoming, that the Department find a balance between protecting the environment and developing our nation's energy resources in a responsible way.

I think that the Obama Administration failed to find that balance. They pursued a burdensome regulatory agenda that resulted in far more harm to the economy than benefit to the environment. But Congress and the Trump Administration have taken decisive steps to reverse the trend, such as the Executive Order promoting energy independence and economic growth. The Executive Order gives federal agencies the opportunity to review and, if appropriate, suspend, revise or rescind harmful regulations that burden the energy sector of the American economy.

So my question is what steps do you intend to take to remove some of these regulatory burdens to the safe and efficient production of energy resources?

Mr. BERNHARDT. Well, thank you for that question, Senator.

From my perspective, environmental standards need to be maintained. But anyone who goes to the CEQ regulations today would see that they say things such as a complex, environmental impact statement should be 300 pages. If you look at the reality in today's permitting processes, what you would see are environmental impact statements that are hundreds or thousands of pages more than what is suggested.

And I believe that we need to ensure that there's public participation and input. I believe that we need to think about alternatives in terms of specific projects. And we need to ultimately make very informed decisions which include the information regarding our required statutes.

But I don't believe we need to do it in the way that we do it because we are a country that is suffering from paralysis of analysis, if you will. And part of it's driven by ultimate litigation factors, but I could show you proposed projects that just the documentation for a project is costing \$250 million and taking a decade. There's no reason for that to happen. If it's a bad project, we should say it's a bad project and move on.

But we need to streamline our systems, and we're prepared to do that. And then we're prepared to manage aggressively as it relates to multiple use.

Senator BARRASSO. You talked about some of the costs and some of the delays, you know, excessive permitting delays at the Bureau of Land Management really do present additional challenges for our rural communities.



In fact, on April 30th this year the BLM, the Bureau of Land Management, had 3,000 pending applications for permits to drill oil and gas on federal land.

There is an article, Madam Chairman, I would like to put into the record.

The CHAIRMAN. It will be included.

[The information referred to follows:]

## OIL AND GAS

**3K drilling permit applications await BLM approval**

Pamela King, E&amp;E News reporter

Published: Wednesday, May 17, 2017



Addressing a backlog of applications for permits to drill is among Mike Nedd's priority tasks as acting director of the Bureau of Land Management. Photo by Pamela King

The Bureau of Land Management is staring down the task of tackling nearly 3,000 outstanding bids to drill on public land.

BLM's backlog of applications for permit to drill (APD) landed on a leaked internal "priority work" [list](#) (*Greenwire*, April 10). The bureau is currently considering several strategies to cut through the logjam, said acting Director Mike Nedd.

"It may be a strike team. It may be shifting the workload to a different office," he said. "The idea is to really look around and find how best to address this backlog and where the capabilities for doing so lie."

As of April 30, BLM had 2,955 APDs pending, according to data provided by the bureau. That's down from a previous count of 3,785 pending APDs at the end of fiscal 2015.

The APD pileup is concentrated in BLM's Carlsbad, N.M., and Casper, Wyo., field offices, Nedd said. Those offices have experienced a crush of applications to develop in the San Juan Basin and Niobrara Shale — two of the areas of highest interest among industry groups, he said.

Activity also remains high in the North Dakota field office near the once-booming Bakken Shale, he added.

"I think what we're seeing is that it depends on where industry has set up their infrastructure and where their business leads are taking them," Nedd said. "Clearly, in the West, there is lots of interest."

But BLM maintains that it is staying ahead of industry demand. Despite the backlog, the bureau says it is approving APDs nearly twice as fast as companies are drilling wells.

In 2014, then-Director Neil Kornze testified that BLM was providing about two years' worth of headroom to industry. At that time, the bureau had approved nearly 7,000 APDs that were still awaiting industry action. As of Sept. 30, 2015, the most recent set of data, that number stood at 7,532.

The glut of unused permits has puzzled the top Democrat on the Natural Resources Committee. Rep. Raúl Grijalva of Arizona last month raised the question to BLM in his request for data on the current APD backlog (*E&E News PM*, April 12).

"Obviously the BLM isn't responsible for individual company decisions on when to drill, but it is bewildering that the agency would prioritize approving more permits — at the inevitable expense of your environmental responsibilities — when companies have plenty and appear to be simply stockpiling them," Grijalva wrote.

But industry groups say the number of idle permits is of little relevance because — due to government inefficiencies and unpredictable pricing — companies need to collect more permits than they actually use (*Greenwire*, Oct. 23, 2014).

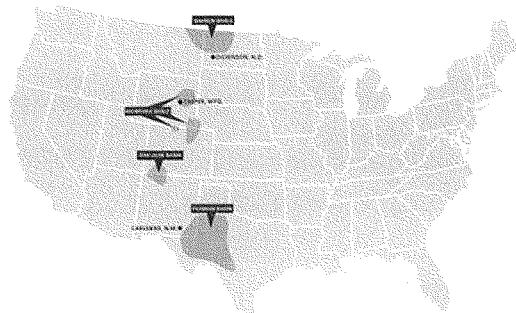
"The backlog of applications for permits to drill is still a very real issue that our member companies are facing," said Neal Kirby, spokesman for the Independent Petroleum Association of America (IPAA). "Every day that goes by while independent producers — companies with an average of 12 employees — wait for their permits to be approved means more money out of their own pockets, more business uncertainty as it relates to long-term planning, and less royalties flowing back to the federal and state treasuries to help fund priorities, such as education and infrastructure projects."

IPAA has urged BLM to use every tool at its disposal to improve the permitting process.

#### More resources, new systems

There are a few new instruments in BLM's toolkit that could help address the backlog.

The fiscal 2015 National Defense Authorization Act created a project to direct back to seven BLM field offices a portion of the fee submitted with each APD. That new revenue stream was designed to enable the busiest offices to hire employees to help process permits in a more timely fashion.



[+] BLM field offices in New Mexico, Wyoming and North Dakota have felt pressure from drilling activity in nearby formations. Map by E&E News.

"Utilizing this tool alone will provide BLM greater flexibility and will help improve the efficiency of the permitting process," Kirby said.

While BLM confirmed that the fee allocation is being implemented, a progress report — the first of which was due in February 2016 — is still underway.

BLM is also in the initial stages of deploying its automated fluid minerals support system to standardize APD processing.

"We began to implement that in 2016, and that's been promising, but like any computer system you implement, it takes some iterations to get it perfect," Nedd said. "We believe that's going to be a big help."

The bureau is taking stock of its field office operations to see if there are any best practices that could be translated to a broader scale, Nedd said.

### **Finding a 'balanced approach'**

Nedd said clearing the APD backlog is consistent with BLM's new aim of opening up additional lands for energy development.

"We're always looking for ways we can create an environment where all-of-the-above energy — wind, solar, oil, gas, coal — is available, and then let industry determine whether to develop," he said. "Our goal is to make certain we're creating an environment where industry can determine where is the wind, oil and coal they would like to develop, and then do it in a way that is environmentally sound and balanced."

Nedd hesitated to say that BLM would add new environmental protections over drilling, suggesting instead that safeguards would be baked into the permitting process. He said the bureau is still brainstorming ideas for improving that process in a way that will also ensure that applications don't sit too long in the queue.

"We want to make certain that when we develop with industry, we are not creating undue or unnecessary burden," Nedd said. "Again, it's that balanced approach. How do we do it in a manner that is safe and balanced?"

Whether BLM's approach translates to more drilling on federal lands depends on energy companies' thirst for new development, he said.

"I think by all accounts, industry is really saying, 'Yes, we would like to develop the resource that is available,'" he said.

Senator BARRASSO. It is just oil and gas, 3,000 drilling permit applications await BLM approval. These permitting delays directly threaten our energy security. They threaten jobs. They threaten economic stability for a lot of small communities. The delays exist across all sectors.

NEPA delays prevent active forest management. They slow our reactions to invasive species issues.

And so, can you talk a little bit about what steps you can take to reduce these permitting backlogs across the Department?

Mr. BERNHARDT. Well, I think the Secretary has made, as a commitment to you in his confirmation, that we're going to focus on giving the front lines the tools that they need to do their job. And I believe that when you look at backlogs in field offices what you find are a few things. Number one, the resources can very well be an issue and often are. The other thing is that at times the field offices are focused on things that are not necessarily within the parameters of the specific mission that the Department has.

So, I think we need to start by asking ourself, what are we doing in these offices as it relates to our specific statutory direction? And then two, making sure that we give our folks on the front line the tools to do their job and the flexibility to make their decisions.

Senator BARRASSO. Thank you.

I appreciate Senator Heinrich's comments and questions regarding Indian affairs. As a former Chairman of the Committee on Indian Affairs, I have a number of questions in that area as well, but I will submit those in writing.

So thank you and thank you for the question.

The CHAIRMAN. Thank you, Senator Barrasso.

Senator Manchin.

Senator MANCHIN. Thank you, Madam Chairman, and thank you, Sir, for your willingness to serve again.

In West Virginia we have over 17,000 acres of land in the Canaan Valley National Wildlife Refuge. I think we spoke about this. And we have a headquarters, it is the headquarters of the refuge, and it is 7,000 square feet and dilapidated and it is really a situation that we need help with. I think we have talked, and my staff has, to an extent with you on this.

The other thing, Mr. Bernhardt, is that that is something that, I think, we are going to do in infrastructure. It is a shovel-ready project. It is ready to go. We have been requesting and requesting and requesting.

First of all, we would love for you to come out and visit. It's not that far. It is only a three-and-a-half-hour drive.

Next of all, we would hope that you would give us the support that we would need, sir, because it is going to take a push from yourself to make something like this a high priority to be done.

There are an awful lot of people, a lot of youth, that use this program, and they are out there continuously for educational purposes. So if you could put that on your radar screen, I would appreciate it very much.

Mr. BERNHARDT. Absolutely, sir.

First off, we'll take you up on the visit. My family regularly goes up to Harper's Ferry, and we love it.

Senator MANCHIN. Oh, you are not that far.

Mr. BERNHARDT. Yes.

That said, we did talk about that issue a little bit. I really appreciate you giving me time to visit with you and I will look into it in more content once I'm——

Senator MANCHIN. I thank you for that.

The other one I have affects a lot of our states, but in the East, you know, we don't have many public lands, most of ours is private. But what we do have, we have Payment in Lieu of Taxes on those that we do have, and that has been a real tough situation and is really with a lot of our counties that they have had the flexibility to use payments for government purposes as they determine by the state awarded the funds. But we are in jeopardy of those funds subsidizing or going away.

This Committee recently held a hearing on the Payment in Lieu of Taxes and Secure Rural Schools. Olivia Ferriter, the DOI Deputy Assistant Secretary of Budget, Finance, Performance and Acquisition, testified on the importance of these programs. Specifically, in her written testimony she said that, "The Trump Administration is interested in ensuring that the Federal Government can fulfill its role of being a good neighbor to local communities."

West Virginia's larger rural state and expiration of these programs will have greater impact than more populated urban states. Specifically, West Virginia has 1.2 million acres of eligible Payment in Lieu of Tax lands and in 2016 we received \$3,113,365 under the program. That was in '16. In 2017 the Omnibus authorities went down to \$465,000.

You can see where we stand on this. So I would ask, in your previous roles in the Department, what, if any, prior work experience have you had working with the Payment in Lieu of Taxes? Has that been part of your purview?

Mr. BERNHARDT. Well, I had the luxury of serving as the Head of Congressional Affairs for a while at the Department of the Interior. And the most significant role I had in the PILT situation was getting yelled at by members of this Committee and the House Resources Committee for the——

Senator MANCHIN. No, not these exact members——

Mr. BERNHARDT. No, not these exact——

[Laughter.]

Getting yelled at because we didn't hit the target right. So I can tell you I will be a strong internal advocate for making sure we get PILT payments right, and we'll see how that plays out in the budget situation.

Senator MANCHIN. I know there is going to have to be push back, probably, sometimes with some of the Administration because of the cuts and things of this sort and you need to prioritize, but how would you prioritize this PILT program? You can imagine the counties where there is no private money coming in. Land taxes are how we pay for our schools.

Mr. BERNHARDT. Well, I'll tell you, I know how important PILT payments are to local communities. So, I'll tell you that.

And I know that we'll be——

Senator MANCHIN. I hope that you can commit to basically putting it as a high priority.

Mr. BERNHARDT. I can——

Senator MANCHIN. Because of education, it is all tied to education. That is what it is all about.

Mr. BERNHARDT. I'll commit that I'm the only Deputy Secretary that's going to have a Navy Seal for a boss and we'll push internally as hard as we can.

Senator MANCHIN. Thank you, sir, I appreciate it.

The CHAIRMAN. Thank you, Senator Manchin.

Senator Gardner is gone, so Senator Daines, you are next.

Senator DAINES. Alright. Thank you, Madam Chair. Mr. Bernhardt, welcome to the Committee, congratulations.

Your breadth of experience at the DOI will serve the Secretary and the President very well.

Mr. BERNHARDT. Thank you.

Senator DAINES. However, what I think is equally as important as your Western heritage, I was very clear with the Trump Administration when it came time to pick a Secretary of the Interior, it needed to be a Westerner. With all due respect to the Senator from West Virginia, West Virginia, to me, is not West enough.

[Laughter.]

And to me, West—

Senator MANCHIN. It is still wild and wonderful.

Senator DAINES. It is wild and wonderful. I do not disagree.

Wild and wonderful, but I guess it is all relative. To me, West starts at about the North Dakota/Montana border and angles West. As you look right here across this Committee, I think you have got Senators starting with the Chairman, all the way over to here that fit that criteria. I was thrilled to see then-Congressman Zinke become the new Secretary, a friend of mine for 38 years.

The Department of the Interior, as you know, is charged with managing our wildlife, our public lands, including national parks and refuges, our nation's rich mineral resources, which are key to American energy independence and the sacred responsibility of protecting the Federal Government's trust responsibilities to Indian tribes.

I know stewarding the Department's assets is an incredibly challenging balancing act. This came to bear most directly with you in your Deputy Secretary role in charge of resolving the interagency conflicts.

In Montana and out West we also have learned to strike that important balance in our daily lives. I like to call it finding that balance between John Denver and Merle Haggard. That melody is so important to capture and get it right.

I know you have similar roots in Western Colorado which have, no doubt, informed your world view. Having your family and your mother here, as well, says a lot. You have mastered that melody well, much like Secretary Ryan Zinke.

For these reasons you have earned the support of nearly 30 different sportsmen groups. It is an impressive list, Mr. Bernhardt. The Boone and Crocket Club, the Theodore Roosevelt Conservation Partnership, the Mueller Foundation, the National Wild Turkey Federation, the Rocky Mountain Elk Foundation, headquartered in my home state, the Wild Sheep Foundation, headquartered in my home town. This is an impressive list, and I congratulate you on seeing that kind of widespread support from these important

sportsmen groups. These groups and others are important at what we like to call our outdoor economy in Montana and out West.

But frankly, it is about our state's and our country's heritage. I understand you are an avid hunter. In fact, Senator Gardner, thanks to technology, and I know you haven't allowed your children to tweet today, but Senator Gardner showed me a picture as you were testifying and it was a photo of a beautiful bull moose that you had taken somewhere in Alaska.

Mr. BERNHARDT. From Alaska.

Senator DAINES. From Alaska.

So I know you are an avid hunter. I liked your anecdote about the elk in the freezer. The Daines Family harvested three elk last season. Our freezer runneth over with elk.

You know you are in Montana when the text message you get from your daughter is Dad, she is in college at Montana State University, I just swung by and picked up, and showed, identified which cuts she took from the freezer as she took it home to cook with her roommates.

Conservation, like the LWCF, is important to increasing access to our public lands for hunting, fishing and protecting and restoring wildlife habitat. Can you expand on how you will help balance the needs of outdoor recreation access to public lands and conservation, both key roles of the Department's importance to hunting and fishing and other uses of public lands?

Mr. BERNHARDT. Well, thank you very much for that question.

Look, access to public lands means that everyone can have an opportunity to hunt or recreate and this isn't just the domain of a select few. Where I grew up in Rifle, hunting season was a huge, important activity for our town's economy.

Senator DAINES. I think the namesake of the town, kind of, illustrates that. Just saying.

[Laughter.]

Mr. BERNHARDT. And the truth of the matter is, you know, it impacts you personally in so many ways. The most prized possession I've carried in my wallet since I was in fourth grade is my hunter safety card. The ability to spend time with my kids out there has been phenomenal. And we also have to look at new challenges.

I was on the state Fish and Game Board in Virginia and I pushed for an online hunter education program because kids today don't have the time to spend two days in a program and our numbers went up.

I'm committed to not only focusing on access but ensuring that we get the next generation of hunters committed to the same thing.

Senator DAINES. Yes.

I am out of time, but in closing it is very important, I think, to many of us out West to preserve and protect that for the average, hard-working American.

Mr. BERNHARDT. That's right.

Senator DAINES. Those who still buy their elk tags at Walmart.

Mr. BERNHARDT. That's right.

Senator DAINES. Those are the folks you have to look out for.

Mr. BERNHARDT. Agree.

The CHAIRMAN. Thank you, Senator Daines.

Senator Stabenow.



Senator STABENOW. Well, thank you, Madam Chair. And welcome, Mr. Bernhardt, to you and your family.

I also grew up in a family of hunters and fishermen and wanted to talk to you about the Great Lakes because the Great Lakes are critical to Michigan's economy and way of life. It is not only about our boating and fishing industry and our hunting, but it is over 1.5 million jobs in Michigan and we provide drinking water for over 30 million people. So this is a big deal for us in protecting our water, 20 percent of the world's fresh water.

States in the region work hard to protect the lakes, but we also depend on federal support and partnership. The work by scientists at the U.S. Geological Survey and the Fish and Wildlife Services are critical to combating Asian Carp which continue to be a threat of entering our waters, destroying our fish population and ability to have tourism, other aquatic invasive species which frankly would decimate the Great Lakes.

So here is my concern. When I first came in 2001, I authored the ban on oil and gas drilling in the Great Lakes. We cannot afford a spill in the Great Lakes. I am looking at your long history of lobbying for oil and gas stakeholders and the fact that you have even litigated against the Interior Department on behalf of private interests. In 2001, as the Director of Congressional and Legislative Affairs at Interior, you reportedly modified scientific data from the Fish and Wildlife Service to obscure findings that oil drilling could negatively impact wildlife.

So I am very concerned. We count on scientific information to protect the lakes, to know what we ought to be doing to protect the lakes, as well as our land and air. How do we trust you to preserve scientific integrity and manage public resources for Americans given your history?

Mr. BERNHARDT. Well, thank you for that question. I did not modify scientific data, but I appreciate the question.

And before I enter into it, I'd like to tell you I have a 2520 Parker pilot house boat that sits on the Chesapeake and, if I'm not at work, I'm out there on it. So I love water and fishing too.

But that said, I think that it's important for me to convey two things to you. First, I wasn't involved. I was not the person that modified any data, but I want to tell you how I go about making decisions with science. Perhaps the best example, and it may not make everyone on the Committee happy, but perhaps the best example is the process that Dirk Kempthorne and I went through to ultimately make the determination of whether or not to list the polar bear.

And the reality is that when a listing decision was about to be made, at least proposed in a proposed regulation, I looked at the record as a lawyer. And I said, this record is pretty weak. We might be able to go left or right, whatever the Secretary wants to do. And the Secretary made a decision at that moment to ask the U.S. Geological Survey to do more research. They spent a year doing research, and they brought that research back to the Department.

So, we get to the next year and that obviously meant as a lawyer, you know, there's more information to analyze. Secretary Kempthorne went through that information incredibly carefully. He

reached his own conclusions on that information which may not be the same conclusions that all of you would reach. But I spent days working with the people who developed the data. And once he made the decision to list the bear as a threatened species, then I looked at the law and said, okay, if that law is the Endangered Species Act, we've used science. He's made his decision. How can we line up things in the law in a harmonious way to reduce conflict? And he did that as a matter of law. So, we look at the science, then we apply the law. And we have to learn the science. We have to understand it. We don't manipulate it. If we're going to use data, we should say why it's one person's versus another.

But we look at the law with the science as an informational base, and then we make a legal determination. And as long as we connect the dots that we've looked at, that we've evaluated it and we've dotted our "I"s and crossed the "T"s, those decisions are going to be upheld and they're going to be upheld legally. And that is the process.

Senator STABENOW. So if I might just because, I apologize, because I am running out of time.

Mr. BERNHARDT. Sure.

Senator STABENOW. I just want to follow up and say, so you are indicating you will honor the agency's professional scientists, regardless of political agenda. I mean, we are in, as you know, a whole different world where we never thought we would have to have a march for science. Let's march for facts. I mean, it is kind of strange world that we are in right now.

Mr. BERNHARDT. So—

Senator STABENOW. But the reality is that scientists and science are under attack throughout the Administration. And so, are you saying that you will honor the professional scientists and what they recommend based on scientific facts?

Mr. BERNHARDT. Well, I would say first, that I'm certain that the scientists at the Department of the Interior are not under attack, number one.

Number two, I will take the science. I will look at the science. And you take the science with all its significance and its warts. And you look at that, you evaluate it, and then you look at the legal decision you need to make. In some instances the legal decision may allow you to consider other factors, such as jobs. In other instances, it might not. But you've given us whatever that standard is, and we're going to look at it and apply the law and be honest to the science.

Dale Hall, the Director of the Fish and Wildlife Service while I was there, said to this Committee, in a letter, my scientific, you know, I've never, my integrity on science is unquestionable. And that is the fact.

Senator STABENOW. Thank you.

Thank you.

The CHAIRMAN. Thank you, Senator Stabenow.

Senator Flake.

Senator FLAKE. Thank you, Madam Chair.

Thank you for the testimony so far, and I appreciated the meeting we had in my office.

The decisions made by the Department of the Interior have an outsized impact on Arizona. The Department of the Interior manages about a quarter of the land directly in Arizona and holds in trust another quarter. So we are looking at half of the land mass in Arizona that is under some jurisdiction of the Department of the Interior.

I was pleased to see Secretary Zinke confirmed and under his leadership, I think, the Department is already starting to listen to those in Arizona who are affected by the Department's decisions.

For example, I commend the Department for looking to all sides of the Navajo generating station lease issue hearings that have been held or listening sessions this week in Arizona with the stakeholders have been helpful. I think people are pleased to see that the Department is listening. I hope that the Secretary will soon make a trip out to Arizona.

Now members of this Committee have heard me talk repeatedly about water, and we talk a lot about it in Arizona. We talk about it more than we have it. That is the problem.

The basin states are very close to coming up, hopefully, with a drought contingency plan. That will be a needed update to the 1944 treaty with Mexico regarding the Colorado River. I believe that we will be well served by your long history dealing with the Colorado River.

Can you talk about some of that, talk about your experience and some of the issues that we have going forward?

Mr. BERNHARDT. Well, candidly, my history with the Colorado River begins probably in first grade. The Colorado River was about 150 feet from my house growing up, and it was an awesome place to be.

But the reality is for my entire career I've understood very well how special the approach taken on the Colorado River is. The seven basin states have worked cooperatively, sometimes encouraged or nudged by the Department, but there is a legacy, there is a legacy of them coming together since the Hoover Commission to reach consensus on very tough issues.

When I was first at the Department we worked on a variety of things. I was involved in the Arizona Water Rights Settlement Act and, you know, I know full well what power the Secretary has as it relates to the Colorado River and the legacy of cooperation that has been shared with the Department and the seven basin states. And I cannot imagine that changing under our watch.

Senator FLAKE. Okay.

Talk a little bit about that role. What is the Department's role? Is it to convene the basin states, to nudge them into an agreement, to work with them after they have reached the agreement? What is the optimal approach?

Mr. BERNHARDT. Well, I think optimally, the Department should be involved, I mean, you know, if push came to shove on the lower Colorado, the Secretary is the water master of the Colorado, lower Colorado, under the law.

But the reality is that it's through encouragement, you know, there's constant meetings between the Department and the various states, as well as some collectively. And it's my belief that we should be engaged and not take a back seat, but at the end of the

day, to the extent that the states can agree on an approach that works for us, we should adopt it.

Senator FLAKE. Great. Thank you.

One area that will require continued cooperation between Arizona and the Department is the tribal water rights settlements. You mentioned that you've been involved in this area. There are several settlements that are in need of legislative action this year alone, many more in the negotiation phase.

How can your previous experience in this area be of help to Arizona?

Mr. BERNHARDT. Well, I think first off I've resolved a number of Indian water rights settlements and other federal reserved water rights settlements. And so, I know, not only the importance to the community of getting it resolved, but the energy and effort that it takes to get to a resolution. And from that standpoint, you know, Secretary Zinke, while he was a Member of Congress, enacted legislation related to a water rights settlement. And so, I believe that he's committed to that. And you know, we, to the extent that we can be helpful, we will.

Senator FLAKE. Right.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Flake.

Senator Cantwell.

Senator CANTWELL. Thank you, Madam Chair.

I am sorry I had to leave to run to vote, and thank you for my colleagues letting me weigh in here.

I wanted to ask you, I mentioned in my statement about previous times that you were at the Department of the Interior and some of the challenges that the agency faced, particularly Deputy Secretary Griles and his conviction for obstructing the Senate Indian Affairs Committee and Julie McDonald for disclosing internal documents and pressuring agency scientists to withhold information improperly. I am assuming you agree with the decision for both of those individuals to be dismissed and prosecuted on those issues?

Mr. BERNHARDT. To be prosecuted?

Senator CANTWELL. I think they were accused of obstructing. I don't know where it went after that. Do you agree with their firings? How about that?

Mr. BERNHARDT. Sure.

Senator CANTWELL. Okay.

And what do you think was wrong with what they were doing at the agency?

Mr. BERNHARDT. Well, if you've looked at and I assume you have reviewed the Inspector General reports?

Senator CANTWELL. Yes.

Mr. BERNHARDT. So, if you look at those reports, what you'll see is that there's two issues. One is the conduct of an employee. But there were also very significant structural issues of how lawyers were advising clients whether that information was moving through the decision-making process.

So what I personally did is I ensured that we put in new legal review processes so that we could always manage to have the clients talking to lawyers in a way that would allow them to freely

communicate their views and move their views up the chain so that things were modified.

Senator CANTWELL. I guess I am trying to get a reading on how egregious you think it was that Julie McDonald tried to pressure the scientists to withhold information or modify scientific data to further the agenda.

Mr. BERNHARDT. So——

Senator CANTWELL. How egregious do you think that is?

Mr. BERNHARDT. Well, I think it was, it was very serious. There are two very serious problems.

One is the manner in which Julie went about a discussion with folks and that was clearly abrasive when you read the report, you see that.

The other fundamental problem was that legal questions and legal information that was provided to the Fish and Wildlife Service as part of the listing packages, was not in and incorporated in the Department and it was the result of that that if you look at that report you'll see that I put a surname, legal review process in place that ensured that legal conflicts, legal conflicts, would rise to me, if necessary, to resolve. And if I couldn't resolve an issue with Julie, I would go to the Deputy Secretary.

So I personally put in place a means to correct, not only correct but proactively eliminate, the problem of a disconnect between what Julie McDonald wanted to do and what the lawyers wanted to do. When it came to me, it was either resolved my way or I went to the Deputy Secretary and I said to him, we need to fix it.

In addition, once these issues came out through Earl Devaney, I went to the Deputy Secretary and I said the following.

Senator CANTWELL. Okay.

Mr. BERNHARDT. I said, I said——

Senator CANTWELL. I have a lot of questions.

Mr. BERNHARDT. I must at least be able to complete my sentence.

I said, Deputy Secretary, we need to revise and evaluate these decisions, and she requested that the Fish and Wildlife Service begin a review process of all decisions so that none of them were tainted.

Senator CANTWELL. You can extend your remarks as long as you want on this. It was just a simple question to get this issue registered to you as how egregious you thought these actions were and how aggressive you might be in the future—it was not pushing you on what you did to rectify that, although that is a different line of questioning.

I have questions about both Cadiz and Westlands, and as you can see, my colleagues are asking these questions because they do not want—we do not want—to have a culture at Interior where people decide to prosecute these things on their own.

Have you received any compensation for your work, including additional shares of stocks on the Cadiz question in compensation since you have exited the firm?

Mr. BERNHARDT. Well, I would exit the firm if I were to be confirmed. And if I did, my ethics agreement is clear that I would not have any continuing interest in the firm and therefore, I would have no interest in anything of value that the firm might have.

Senator CANTWELL. Including shares of stock?

Mr. BERNHARDT. I would have no interest in any shares or theoretical potential for shares, not——

Senator CANTWELL. Do you believe that you or your firm worked on behalf of Cadiz in any way to influence the Trump Administration's decision to reverse the BLM decision either directly or indirectly?

Mr. BERNHARDT. Well I know that I had no involvement with the Trump Administration. I had, either directly or indirectly, I had no involvement on the Cadiz matter with the transition, none with the Department, none with the Hill during that period of time.

Senator CANTWELL. Did you discuss the project with anybody as part of the Trump transition team or any member of Congress?

Mr. BERNHARDT. Absolutely—during that period of time?

Senator CANTWELL. Yes.

Mr. BERNHARDT. Absolutely not.

Senator CANTWELL. Okay.

What about in the last six months in general? Prior to the transition team?

Mr. BERNHARDT. Absolutely not.

Senator CANTWELL. Okay.

As a lawyer do you believe the transition team's non-disclosure agreement authorizes the withholding of information from Congress or is it legally enforceable under the Whistleblower Protection Act?

Mr. BERNHARDT. Well, I hate to give you a lawyer's answer to a legal question in a hearing, but I think the first question would be whether or not the Whistleblower Act will even apply to the transition because it's my understanding that Trump for America is a non-profit entity. And so, I'm not sure that the legal rubric that falls for government would even apply to that. I just don't—simply don't—know the answer to that right now.

Senator CANTWELL. I see I'm over my time. We will come back on a second round, Madam Chair.

The CHAIRMAN. Thank you.

Senator CANTWELL. Thank you.

Thank you.

The CHAIRMAN. Senator Risch.

Senator CANTWELL. Thank you.

Senator RISCH. Very deep questions, Senator.

Senator CANTWELL. Very important issues.

Senator RISCH. Mr. Bernhardt, thank you so much. Madam Chairman, I really do not have any questions for Mr. Bernhardt.

He was very gracious to come and spend quite a bit of time with me. I find him uniquely qualified for the job. I am an enthusiastic supporter.

The bad news for him is we confirm a lot of people for a lot of positions. This is a really tough position. There is nothing easy that is going to come across your desk. And I want to thank you for your willingness to take this on. Thank you to the family that is going to sacrifice also.

My first year in law school I remember one of the professors saying, ah, the law is a jealous mistress. And we all, kind of, laughed. And he was right. It takes a lot of time, and there is a lot of sacrifice involved.

Again, thank you for your willingness to do that, and I look forward to working with you. As you know, my state, the Western states, have huge issues because of our interface with the Federal Government and the Federal Government's ownership of the amount of, the percentage of, land that they have in each of the states. It causes considerable conflict and it is always best if these things can be resolved. I know that you are committed to do that and look forward to working with you.

So, with that, thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Risch.

Senator Franken.

Senator FRANKEN. Thank you, Madam Chair.

Good to see you again, Mr. Bernhardt.

You talked already—we talked about science. He talked about it here thus far.

In the polar bear being listed under the Endangered Species Act, the listing decision stated most of the observed increase in globally average temperatures since the mid-20th century is very likely due to the observed increase in the anthropogenic, man-made, greenhouse gas concentrations. Do you agree with that opinion?

Mr. BERNHARDT. That was in the rule?

Senator FRANKEN. That was in the decision.

Mr. BERNHARDT. Yup. I would absolutely agree with that.

Senator FRANKEN. Okay.

So, you believe that climate change is a serious threat that requires aggressive action?

Mr. BERNHARDT. I believe that we need to take the science as it comes, whatever that is. And we need to—

Senator FRANKEN. I think the science is pretty decided on this.

Mr. BERNHARDT. I know and we talked about that in your office.

Senator FRANKEN. And in my office you seemed to agree.

Mr. BERNHARDT. I certainly agree that we take the science as we find it, whatever it is.

Senator FRANKEN. That's not—

Mr. BERNHARDT. And I personally believe that the contribution is significant, very significant. Now, that's different, that's different than what we do with it. And here's where people disagree. My task will be to take the science as we find it, put it in the paradigm of the Administration's policy perspective which is we are not going to sacrifice jobs for this and then look at the legal rubric and say, how do we, how do we apply the law there?

So, for example—

Senator FRANKEN. Okay, here is the question though.

When you say sacrifice jobs, we know there are jobs and probably a lot more jobs in clean energy, and we have seen a lot more jobs in solar, and we have seen a lot more jobs in wind than, you know, Senator Manchin sits to my right. I know he likes coal jobs, but they are not coming back and that is partly due to natural gas.

But if you are going to argue—what about the jobs that we are going to have dealing with climate dislocation and refugees? What about the jobs we are going to have when the East Coast is flooded? What about those jobs?

If we don't, you know, I think it is very shortsighted to talk about the extra jobs that you get by drilling for fossil fuels when

the science is telling us that by the end of the century and God willing, your kids, who are beautiful, by the way, whether they will make it to the end of the century.

The scientists tell us that we are going to have about four degrees Centigrade increase in temperature and the military, and we talked about this, the Defense Department, it knows very well that this is a threat, the greatest national security threat to us. So, this calculus of, well, how many jobs is—yes, but it is incredibly short-sighted, I think, to look at it that way.

So my question to you is climate change an existential threat to you because I would suggest that the science is in and to say we are going to take the science as we take it? The science is in.

Mr. BERNHARDT. Would you like me to respond?

Senator FRANKEN. That's what the long pause was for?

[Laughter.]

Mr. BERNHARDT. Wasn't sure.

Here is the reality. We are going to look at the science, whatever it is, but policy decisions, policy decisions are made. This President ran. He won on a particular policy perspective.

That perspective is not going to change to the extent that we have the discretion under the law to follow it. In some instances, we might now, but those that we do, we are absolutely going to follow the policy perspective of the President.

And here's why. That's what—the way our republic works and he is the President.

Senator FRANKEN. Okay, you also talked about some ethics problems during your eight years in Interior that were brought up. I will save that for the second round because I see I am losing my time. So I will be here for a second round.

Mr. BERNHARDT. Yes, sir.

The CHAIRMAN. Thank you, Senator Franken.

Let's go to Senator King.

Senator KING. Thank you.

First I want to address my comments to your daughter. As I came in I looked on the TV screen, and you are in every picture of your dad. So you have to look very attentive and don't even think about touching your phone.

[Laughter.]

Mr. Bernhardt, I want to say, you are the first person in the history of the human race to ever use the words, "luxury to serve as Director of Congressional Affairs."

[Laughter.]

I will let that one go. Your credibility diminished though.

I understand from our discussion that you grew up in a small town in Colorado near a national monument. Is that correct?

Mr. BERNHARDT. Well, I grew up near public lands. There's a national monument about 60 miles away. So—

Senator KING. Does that national monument contribute to the economy of the region?

Mr. BERNHARDT. Absolutely.

Senator KING. It is a positive?

Mr. BERNHARDT. It is.

Senator KING. Well, I want to ask you a few questions.



As you know the President signed an Executive Order which led to the review of a series of national monuments. The cutoff was 100,000 acres for the list. Then there was one monument added under 100,000 acres which happens to be in the State of Maine, and it said that the question there was adequate public outreach and coordination with relevant stakeholders.

Would you give me your views on what that means? What would you consider adequate public outreach and coordination with relevant stakeholders?

Mr. BERNHARDT. Well, I certainly can't speak to the specifics of the——

Senator KING. No, no. I am asking in general. What would adequate public outreach and coordination with relevant stakeholders look like?

Mr. BERNHARDT. Well, my expectation would be that public meetings were held, the views of the state representatives, the views of congressional representatives, were all part of——

Senator KING. Local businesses.

Mr. BERNHARDT. Making an informed decision.

Senator KING. Local businesses?

Mr. BERNHARDT. Of course, local businesses, the public at large in open meetings.

Senator KING. Open meetings involving the Department of the Interior?

Mr. BERNHARDT. Absolutely, sir.

Senator KING. So that would look like adequate——

Mr. BERNHARDT. Well, it would certainly look like a darn good start.

Senator KING. Thank you.

As Solicitor one of the legal questions about the Antiquities Act is the authority of the President. It is clear the President has the authority to create national monuments. There is no expressed authority to undo a national monument.

Do you believe under the Antiquities Act the President has the authority to eliminate a national monument that was duly promulgated during a prior Administration?

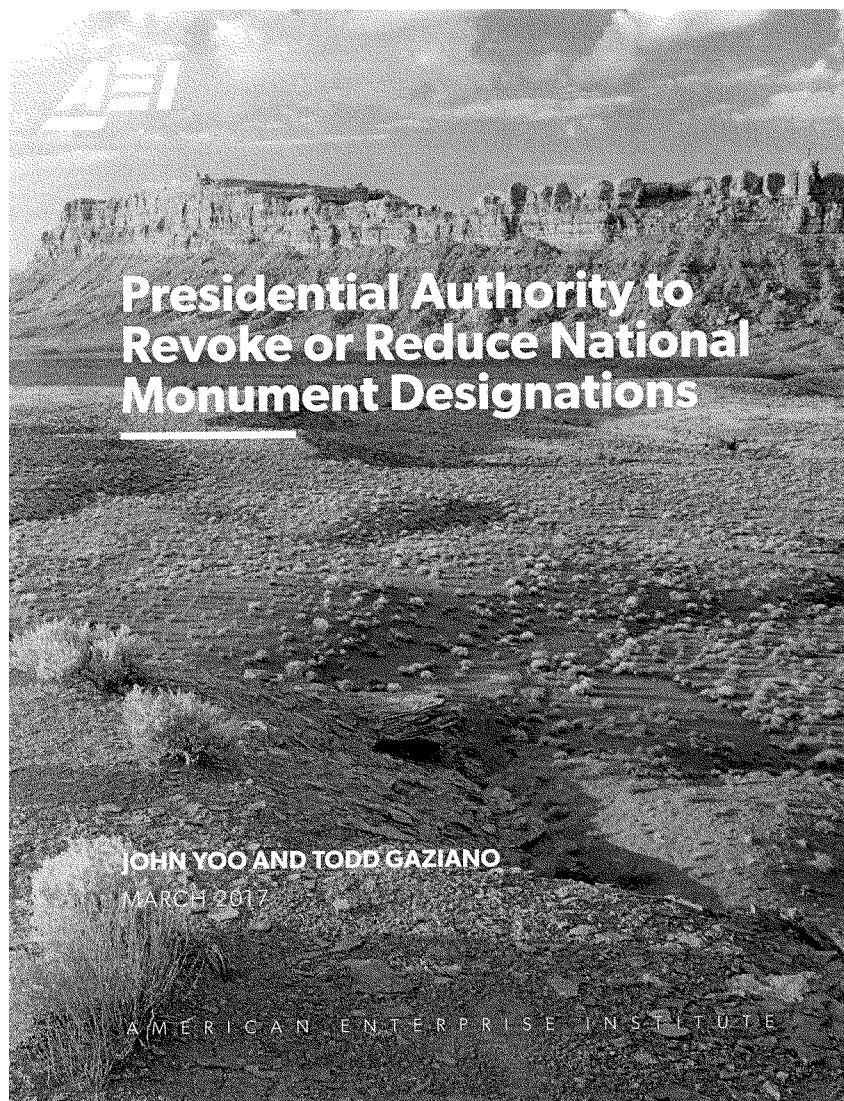
Mr. BERNHARDT. So, I could show you legal opinions going both ways and——

Senator KING. I wish you would because I have only seen legal opinions that say that the President can't do it.

If there are——

Mr. BERNHARDT. I would be happy to provide some to you.

[The information referred to follows:]



## Executive Summary

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The Antiquities Act of 1906 grants the president the power to designate national monuments in order to protect archeological sites, historic and pre-historic structures, and historic landmarks, such as battlegrounds. We are confident that, pursuant to this power to designate, a president has the corresponding power to revoke prior national monument designations, although there is no controlling judicial authority on this question. Based on the text of the act, historical practice, and constitutional principles, we have even more confidence that he can reduce the size of prior designations that cover vast areas of land and ocean habitat, although his power of reduction may in some instances be related to his implicit power of revocation.

An attorney general opinion in 1938 concluded that the statutory power granted to the president to create national monuments does not include the power to revoke prior designations. The opinion has been cited a few times in government documents, including by the solicitor of the Interior Department in 1947 (although for a different proposition) and in legal commentary, but the courts have never relied on it. We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists.

Apart from a general discretionary power to revoke monuments that were lawfully designated, we think the president has the constitutional power to declare

invalid prior monuments if they were illegal from their inception. In the first instance, there is no reason why a president should give effect to an illegal act of his predecessor pending a judicial ruling. Beyond this, we think the president may also have a limited power to revoke individual monument designations based on earlier factual error or changed circumstances, even if he does not possess a general discretionary revocation power.

In addition to the above powers, almost all commentators concede that some boundary adjustments can be made to monument designations, and many have been made over the years. In 2005, the Supreme Court of the United States implicitly recognized that such adjustments can be made. The only serious question is over their scope. No court has ruled on this question. Some commenters claim this is because no president has attempted to significantly reduce the size of an existing monument, but that is simply inaccurate. In the act's early years alone, some monuments were reduced by half or more.

Regardless of past practice, arguments that limit the president's authority to significantly reduce prior designations are largely conclusory—and based on the erroneous premise that the president lacks authority to revoke monuments—or driven by a selective reading of the act's purpose rather than its text. We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances.

# Presidential Authority to Revoke or Reduce National Monument Designations

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BY JOHN YOO AND TODD GAZIANO

As he left the Oval Office, President Barack Obama tried to exempt his environmental policies from the effects of the November 2016 elections. Five days before Christmas, the White House announced the withdrawal of millions of acres of Atlantic and Arctic territory from petroleum development. Obama continued his midnight orders by proclaiming 1.35 million acres in Utah and 300,000 acres in Nevada to be new national monuments. White House officials claimed that both types of actions were “permanent” because there was no express authority to reverse them. But that gets the constitutional principles and legal presumptions exactly backward. All the ex-president will prove is the fleeting nature of executive power.

These actions, like many others taken by the Obama administration, will remain vulnerable to reversal by President Donald Trump. In our constitutional system, no policy can long endure without the cooperation of both the executive and legislative branches. Under Article I of the Constitution, only Congress can enact domestic statutes with any degree of permanence. And because of the Constitution’s separation of powers, no policy will survive for long without securing and retaining a consensus well beyond a simple majority. Our nation’s most enduring policies—antitrust, Social Security, and civil rights—emerged as the product of compromise and deliberation between the political parties.

President Obama’s refusal to compromise with his political opponents will guarantee that his achievements will have all the lasting significance of Shelley’s *King Ozymandias*.<sup>1</sup> The president’s only substantial

legislative victories, Obamacare and Dodd-Frank, never gained bipartisan input or broad support. Trump executive appointees can begin unraveling both laws with executive actions, with legislation to significantly alter them to follow. President Obama’s refusal to yield an inch to Republicans intensified their opposition over many years and created a powerful electoral consensus to reverse these alleged reforms. The coming fight over public lands shows, in microcosm, the constitutional dynamics that render Obama’s legacy so hollow.

## Background on Antiquities Act National Monument Designations

The original motive for the Antiquities Act of 1906 was to protect ancient and prehistoric American Indian archeological sites on federal lands in the southwest from looting. The Antiquities Act was passed during the same month (June 1906) as the act creating Mesa Verde National Park, and the problems that arose in protecting the Mesa Verde ruins inform the Antiquities Act’s central focus. In a report to the secretary of the interior, Smithsonian Institution archeologist Jesse Walter Fewkes described vandalism at Mesa Verde’s Cliff Palace:

Parties of “curio seekers” camped on the ruin for several winters, and it is reported that many hundred specimens there have been carried down the mesa and sold to private individuals. Some of these objects

are now in museums, but many are forever lost to science. In order to secure this valuable archaeological material, walls were broken down . . . often simply to let light into the darker rooms; floors were invariably opened and buried kivas mutilated. To facilitate this work and get rid of the dust, great openings were broken through the five walls which form the front of the ruin. Beams were used for firewood to so great an extent that not a single roof now remains. This work of destruction, added to that resulting from erosion due to rain, left Cliff Palace in a sad condition.<sup>2</sup>

The legislative history of the Antiquities Act on the Department of Interior website provides additional historical detail,<sup>3</sup> but the act's text confirms that its primary purpose was to "preserve the works of man."<sup>4</sup> Section 1 of the original act made it a crime to "appropriate, excavate, injure, or destroy any historic or prehistoric object of antiquity" on federal land without permission. Section 3 provided for permits for the examination of "ruins, the excavation of archeological sites, and the gathering of object of antiquity upon" federal land. Section 4 provided the authority to the relevant department secretaries who managed federal land to issue uniform regulations to carry out the act's provisions. Section 2, which allows for the designation of national monuments and the reservation of such federal land as is necessary to protect the objects at issue, also focuses primarily on "historic and prehistoric structures, and other objects of historic or scientific interest" (emphasis added).

The addition of only two words, "historic landmarks," in that sequence in Section 2 (see below) denotes something broader than preserving human artifacts. In prior proposals to protect antiquities, the Department of Interior had sought authority for scenic monuments and additional national parks, but Congress repeatedly rejected that authority.<sup>5</sup> Congress was annoyed by large forest designations and guarded its authority over western lands jealously.<sup>6</sup> Yet the final language has been used and abused for such purposes, or effectively for such purposes—since the official designation of national parks is still left to Congress.

As previously mentioned, Section 2 of the Antiquities Act not only allows protection for small areas around human archeological sites but also authorizes the president:

in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and maintenance of the objects to be protected.

There are three steps to land being reserved and protected under the Antiquities Act, the first two of which are delineated in the section above. First, the monument must be declared for a protective purpose upon lands owned or controlled by the United States. Second, a reservation of certain parcels of land that constitute a "part thereof" may be made, but such parcels of land may not exceed what is necessary to protect the "objects" at issue. And third, the president may specify certain restrictions or other protections that apply to the land thus reserved for the monument in the initial proclamation, or the relevant department secretary who has responsibility to manage the monument may issue regulations consistent with such protections.<sup>7</sup>

Although the act's final language covered more than antiquities, and there is evidence that small scenic landmarks were contemplated, the statute's title, drafting history, and historical context may still be valuable to presidents who want to follow the text and spirit of the original law. For example, earlier and contemporaneous bills for the same purpose limited monument designation to 320 or 640 acres.<sup>8</sup> The final bill replaced that with the (now seemingly open-ended) requirement that such monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," but that was added to provide flexibility for special situations and not to allow a million-acre designation. Such

background also helps illuminate earlier presidential abuses, whether such abuses rise to the level of a statutory violation or are just garden-variety political acts that offend individual due process rights and separation of powers principles.

Besides Mesa Verde National Park, only a handful of other national parks existed in 1906. Congress did not create the National Park Service to manage them until 1916. The Grand Canyon, for example, was not a national park in 1906 and was open to mining claims and other federal program leases.

President Theodore Roosevelt initially used his new Antiquities Act authority to protect some relatively small landmarks (e.g., Devils Tower) and Native American ruins (e.g., El Morro and Montezuma Castle), but his abuses were not long in coming. In 1908, he proclaimed the Grand Canyon National Monument, reserving more than 808,000 acres for its protection. Although later Congresses converted some national monuments covering large geological formations into national parks, including the Grand Canyon National Park in 1919, the Congress that enacted the Antiquities Act did not intend monuments of that size to be established by presidential designation.

Nevertheless, the Supreme Court relied on the validity of the 1908 reservation that created the Grand Canyon National Monument in rejecting a private mining claim in *Cameron v. United States*.<sup>9</sup> There is no indication that the size of the original monument designation was at issue, perhaps because Congress had recently converted the monument into a national park. Yet the Supreme Court also has considered issues relating to two other large monuments or former monuments.<sup>10</sup> While the original monuments' sizes were not challenged in any of these cases, it is unclear whether the courts will invalidate large geological monument designations due to their size alone.<sup>11</sup>

Even so, the Antiquities Act's primary motivation and historical context is still legally relevant to refute the arguments of those who would limit a president's revocation power based on a selective and misleading statement about its purpose. Moreover, other interpretive questions remain open, such as the meaning of the textual requirement that the lands being reserved

under the monument designations are "owned or controlled" by the United States.

Three of the most important Indian lands where prehistoric artifacts might be looted were not even states in 1906; Arizona, New Mexico, and Oklahoma were then federal territories. Hawaii was only recently annexed and organized as a territory, and Alaska was still a sparsely settled American "district" after the gold rushes of the 1890s—not yet an official federal territory. These were areas of exclusive federal ownership and control.

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## The Congress that enacted the Antiquities Act did not intend monuments of [such massive] size to be established by presidential designation.

Other areas of the West that included early national monument designations were owned by the national government, so an issue of control short of ownership was not at play in any of those designations. That may be relevant to the type of control Congress intended as a predicate to the exercise of authority under the Antiquities Act. (See later discussion regarding marine areas, especially those not owned by the United States and subject to limited regulation or control.)

### A General Discretionary Power to Revoke Prior Designations

Attorney General Homer Cummings advised President Franklin Roosevelt in 1938 that he lacked the authority to revoke President Calvin Coolidge's

designation of the Castle Pinckney National Monument because he concluded that no power existed to revoke a prior monument designation.<sup>12</sup> Although the opinion has been cited in some later government documents<sup>13</sup> and by legal commentators, no court has ruled on the president's revocation power or cited the opinion, in part because no president has attempted to revoke a prior designation. In all events, the 1938 attorney general opinion is poorly reasoned, and we think it is erroneous as a matter of law.

The attorney general was first authorized to issue legal opinions to the president under the Judiciary Act of 1789, now codified at 28 U.S.C. §§ 511-513, and to other agency heads by that act and other delegations of authority from the president. Attorney general opinions, and those that now are issued by the Department of Justice (DOJ) Office of Legal Counsel (OLC), are binding on executive branch agencies. In contrast, a president is free to disregard them—especially if he concludes that his oath to take care that the laws are faithfully executed conflicts with such an opinion.

Nevertheless, prudence dictates that the next president request that his own attorney general reexamine such opinion, perhaps with the assistance of OLC, which became an independent division of the DOJ in 1951 and is commissioned to provide serious legal analysis on such matters. The existence of Cummings' 1938 published opinion is an internal hurdle that any administration should address, preferably with another published opinion, either affirming, qualifying, or overruling Cummings' advice.

In 1938, Cummings addressed the question of whether the secretary of the interior could abolish the Castle Pinckney National Monument in Charleston, South Carolina, and transfer the land to the War Department. Under the Antiquities Act, President Coolidge had formed the monument in 1924 from a US fort that had existed in the Charleston harbor since the early 19th century. As Cummings observed, the Antiquities Act contained no clear textual authorization to "abolish" national monuments. "If the President has such authority, therefore, it exists by implication."<sup>14</sup>

Cummings concluded that without clear authorization from Congress, President Roosevelt could

not reverse the designation of Castle Pinckney as a national monument. In a brief opinion, he relied on two grounds. First, he believed Attorney General Edward Bates had settled the issue in an 1862 opinion that found that the president could not return a military reservation to the pool of general public lands available for sale. Second, he compared the Antiquities Act to other federal laws governing temporary withdrawals of federal land or forests, which explicitly provide for presidential modification of past designations. In addressing past practice, which he conceded supported a right to reduce the size of national monuments, Cummings argued that "it does not follow from power so to confine that area that he has the power to abolish a monument entirely."<sup>15</sup>

We believe the 1938 opinion is wrong in some obvious respects and too cursory to be persuasive, even if its errors were excised. One major flaw is Cummings' misreading of Bates' opinion,<sup>16</sup> 44 years before the enactment of the Antiquities Act. Bates' opinion discusses whether an administration in the 1840s could rescind a military reservation in Illinois for which Congress had appropriated money and on which a fort had been constructed. He found that the statute delegating to the president the power to designate land for military purposes did not include a power to withdraw the designation. Bates seemed to believe that delegated power, once used, could not be activated to reverse the decision—that the president had effectively exhausted the delegation of power. "A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can."<sup>17</sup>

But the original 1862 opinion contains many factual and legal distinctions that Cummings does not address. For example, Bates states that he is interpreting military reservation authority under "early acts of Congress" and an "act of 1809," which provided appropriations for constructing forts "for the protection of the northern and western frontiers." Perhaps most importantly, the 1862 opinion acknowledges that the

military reservation itself could be abandoned by the War Department, which is the equivalent of revoking a land reservation under the Antiquities Act. It also relies on the fact that in 1858, Congress had specifically repealed any statutes that authorized the sale or transfer of military sites to the public. Of course, no such express statutory prohibition on the presidential withdrawal of national monument status exists in the Antiquities Act.

Instead, Bates' opinion focuses on whether an abandoned military reservation and its buildings would be subject to "entry or preemption by settlers." This refers to the Preemption Act of 1841, which allowed squatters on federal land during the 1840s and 1850s to secure title to it at a low price (preempting a general public sale) if they also worked it for a number of years.<sup>18</sup> To conclude that squatters could not simply enter the military reservation and secure title to it "by preemption," Bates' opinion relies on a combination of factors that are distinguishable from revoking a monument designation under the Antiquities Act, including: the unnamed "early acts of Congress," which authorized its initial selection as a military reservation; the 1809 appropriation for military forts on the frontier; that Fort Armstrong had been constructed and occupied for more than two decades; that its buildings were still in good order; that other laws governed the sale of abandoned military property; and more recent acts of Congress relating to the particular piece of property, which assumed it was not subject to preemption by settlers.

Cummings did not acknowledge these and other potential distinctions. Bates found that separate laws governed the management and disposal of military property from the homesteading or preemption laws that had populated Kansas and Nebraska. It is not surprising that interpreting different statutes yields different results, but even so, Bates conceded that an improved military reservation could be abandoned and sold, just not pursuant to the Preemption Act of 1841. Cummings mistakenly read the 1862 opinion for the proposition that once land is reserved under any act of Congress, that reservation can never be rescinded.

In contrast to the question Bates addressed, revoking a monument designation under the Antiquities

Act would not change the federal ownership of the land at issue. For this and other reasons, the portion of the 1862 opinion that Cummings quoted is especially questionable as applied to land reservations under the Antiquities Act. The quoted language also contains several inapt analogies and question-begging propositions of law.

For example, Cummings quotes the proposition that the "power to execute a trust, even discretionarily, *by no means* implies the further power to undo it when it has been completed" (emphasis supplied). The italicized phrase is misleading. Not every grant of a power to create something must include the power to abolish it, but many do. Special circumstances might make revoking certain acts impossible, or that power might be withheld, but a presumption of revocability is often implied if the grant is silent.<sup>19</sup>

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### **Not every grant of a power to create something must include the power to abolish it, but many do.**

Indeed, reliance on trust law should have led to the opposite conclusion, at least under the Antiquities Act. Under general trust principles, at least in the 20th and 21st centuries, the power to create a trust includes the power to revoke it when the settler retains an interest in it, unless the trust is expressly irrevocable under the original grant of authority.<sup>20</sup> If a court applied trust law principles to the Antiquities Act, we think it would conclude that the president retains an interest in the monument designations he or a predecessor creates, including that he has the duty to manage them, issue and enforce regulations to protect them, and adjust their borders from time to time with subsequent presidential proclamations. Moreover, the broader principle of trust law is that



the party creating the trust has the power to decide whether it is revocable; the discretionary nature of the president's power under the Antiquities Act and certain textual cues suggest Congress did not intend to make all monument reservations permanent.

Cummings' reliance on Bates' constitutional-statutory analysis fares no better than his reliance on trust law. It is true that a president has no general constitutional authority to manage federal land, although he may have some limited powers as commander in chief or under other statutory grants of authority. That, however, does not answer whether Congress' grant of authority in "early acts of Congress" or the Antiquities Act of 1906 to make reservations includes the power to rescind or revoke them. Indeed, Bates conceded that military reservations could be abandoned; he just believed the land would not be subject to "preemption by settlers." In the context of the Antiquities Act that Cummings was supposed to interpret, a president could rescind or amend the parcels of land reserved for a given monument without repealing the underlying monument designation. There is no evidence that Congress intended to withhold either revocation power in the Antiquities Act, let alone both of them.

Bates' final constitutional-statutory proposition is equally circular as applied to the Antiquities Act. He asserts that reading the unnamed "early acts of Congress" and especially the 1809 appropriation to allow "preemption by settlers" would effect a repeal of the underlying laws: "To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will." That presidents cannot unilaterally repeal statutes does not answer whether Congress included the power both to make and revoke reservations in the original grant of authority under the Antiquities Act.

Cummings' only attempt at an original argument starts and ends with one of the Antiquities Act's purposes: "to preserve . . . objects of national significance for the inspiration and benefit of the people of the United States." Cummings then immediately concludes, in *ipse dixit* fashion (without making a coherent argument), that: "For the reasons stated above, I am of the opinion that the President is without

authority" to issue a proclamation revoking the Castle Pinckney National Monument.

Such casual reliance on one of the act's purposes, and one that was not set forth in the act itself, adds nothing of weight, since it does not explain why revoking the monument at issue was inconsistent with that general purpose of preserving objects of national significance. What if the president determined, for example, that no objects of national significance remained at a given site?

Cummings also does not fairly consider other purposes. If a textual ambiguity justified a resort to legislative materials, the full record would show that the act's primary purpose was to provide a power to the president to prevent the destruction and looting of artifacts until they were excavated and safeguarded or until Congress could consider long-term measures regarding the site. This more complete statement of purposes highlights that the passage of time matters and that a later president could reasonably conclude that Congress declined the opportunity to legislate on the land or objects in an earlier monument designation or that they were now safeguarded, such as by excavation and display in a museum.

A proper analysis of the revocation power under the Antiquities Act would also consider other grants of authority to the president in the Constitution and other statutes and how the courts and constitutional practice have treated them. Cummings made no effort to do that in 1938, and the range of presidential action the courts have upheld, even under older delegations dating to the post-Civil War era, is now more muscular than in early-20th-century jurisprudence.

Although our research is limited on analogous delegations, we believe the general principle would prevail that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation. One particularly relevant statutory example is the executive's power to issue regulations pursuant to statutory authority. When Congress gives an agency the discretionary authority to issue regulations, it is presumed to also have the authority to repeal them.<sup>41</sup> This is especially true when the regulation has shown to be contrary to the

purposes underlying the statute.<sup>22</sup> Section 4 of the Antiquities Act grants three department secretaries the power to publish “from time to time uniform rules and regulations for the purpose of carrying out this Act.” Although Congress did not expressly state that the officials can repeal or significantly alter their regulations once they are published “from time to time,” that is presumed by law. The broader power of revocation by the president should also be presumed.

Constitutional law axioms are even more relevant in undermining Cummings’ view. A basic principle of the Constitution is that a branch of government can reverse its earlier actions using the same process originally used. Thus, Article I, Section 7, of the Constitution describes only the process for enacting a federal law. A statute must pass through both bicameralism (approval of both Houses of Congress) and presentment (presidential approval). But the Constitution describes no process for repealing a statute.

Under the Obama administration’s logic, Congress could not repeal previous statutes because of the Constitution’s silence. Since the adoption of the Constitution, however, our governmental practice is that Congress may eliminate an existing statute simply by enacting a new measure through bicameralism and presentment. While passage of an earlier law may make its repeal politically difficult, due to the need to assemble majorities in both Houses and presidential agreement, no Congress can bind later Congresses from using their legislative power as they choose.

This principle applies to all three branches of the federal government. The Supreme Court effectively repeals past opinions simply by overruling the earlier case, as most famously occurred in *Brown v. Board of Education*,<sup>23</sup> which overruled *Plessy v. Ferguson*.<sup>24</sup> While the Court may follow past precedent out of *stare decisis*, it also employs the same procedure to reverse the holding of past cases, as Congress does to reverse an earlier statute. Both a precedent and its subsequent overruling decision require only a simple majority of the justices. No Supreme Court can bind future Supreme Courts.

This rule also applies to the Constitution as a whole. In Article V, the Constitution creates an additional process for amending its own text, which

requires two-thirds approval by the House and the Senate and then the agreement of three-quarters of the states. Without this additional option in Article V, the Constitution would require the same or a similar process for its amendment as for its enactment, which would have impractically required a new constitutional convention. Reinforcing our point, the framers decided to set out explicit mechanisms for repealing part of the original constitutional text when they wanted to provide a means that did not mirror the original enacting process.

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## No president can bind future presidents in the use of their constitutional authorities.

The same principle applies to the constitutional amendments themselves. The Constitution contains no provision for undoing a constitutional amendment. Instead, the nation has used constitutional amendments to repeal previous constitutional amendments. The 21st Amendment repealed Prohibition, which had been enacted by the 18th Amendment. When the Constitution is silent about a method for repeal, it is assumed that we are to use the same process as that of enactment.

The executive branch operates under the same rule. No president can bind future presidents in the use of their constitutional authorities. Presidents commonly issue executive orders reversing, modifying, or even extending the executive orders of past presidents, and no court has ever questioned that authority, even when it is used to implement statutorily delegated powers. Good examples include the successive executive orders Presidents Ford, Carter, Reagan, Clinton, George W. Bush, and Obama used to specify how the congressionally mandated rulemaking process would be conducted and reviewed in the executive branch.<sup>25</sup> It would be quite an anomaly to

identify an executive directive or presidential proclamation that a subsequent president could not revoke.

Presidents also regularly add or remove executive branch officers appointed to White House committees or even the cabinet. They have created and eliminated whole offices in the Executive Office of the President. They have increased or reduced the use of cost-benefit analysis in regulatory decisions. In fact, when the Constitution deviates from this lawmaking symmetry, it explicitly does so in the text and in a manner that makes repeal easier than the first affirmative act.

The most famous example is the president's removal power. In Anglo-American constitutional history, the executive power traditionally included the power both to hire and fire subordinate executive officials. The Constitution altered the appointment process. Under Article II, Section 2, the president can nominate and, with the Senate's advice and consent, appoint high executive branch officers, judges, and ambassadors. The Constitution, however, did not explicitly address removing an officer.

In *Myers v. United States*,<sup>26</sup> the Supreme Court found that the Constitution implicitly retained the traditional rule that a president could unilaterally undo an appointment without the Senate's approval. In revoking an official's commission that was issued after Senate confirmation, the president is more clearly negating a specific, deliberative, and official Senate act. By contrast, revoking a predecessor's individual monument designation does not negate anything in particular that Congress approved.

A similar dynamic applies to the Treaty Clause. Under Article II, Section 2, of the Constitution, the president can make treaties subject to the advice and consent of the Senate. Again, the Constitution does not explicitly address terminating a treaty. But as a four-justice plurality of the Supreme Court and the US Court of Appeals for the DC Circuit have found, the president retains the traditional executive authority to unilaterally terminate treaties.<sup>27</sup> Past presidents and Senates cannot bind future presidents to treaties, just as they cannot prevent future presidents from removing executive branch officials.

Although the power to unilaterally abrogate a treaty flows from a grant of constitutional authority

to the president to manage foreign relations, Congress is also constitutionally prohibited from delegating a statutory power to the president and then micromanaging the discretion granted.<sup>28</sup> Thus, even if the Antiquities Act attempted to prevent later presidents from using its authority to reverse an earlier monument designation, that would raise serious constitutional questions.

At a minimum, a thorough and up-to-date analysis of both constitutional principles and statutory examples should be performed before Cummings' opinion is followed.

### **A Limited Power to Revoke Certain National Monuments or Declare Others Invalid**

Even if every monument designation cannot be revoked as a matter of presidential discretion, and we still question such limitation, authority might still exist to abolish some designations based on an earlier factual error, changed circumstances, or an original statutory violation. In short, three determinations, two factual and one legal, may provide strong grounds for certain monument revocations or invalidations.

**New Factual Determinations.** First, if the president concludes that the original designation was mistaken, perhaps because of an archeological fraud, historical error, or improved or updated scientific analysis, the predicate for original designation would be undermined. It would be hard to argue that Congress intended that every curiosity deemed scientifically interesting to a president 100 years ago (the once popular but now discredited and racist branch of human craniology/phrenology comes to mind) forever must remain a valid source of scientific interest and protection. It might be more controversial for a president to determine that a geological monument designation thought to be rare and scientifically interesting by an earlier president is not all that worthy of protection as a monument, but limiting such reevaluation would elevate certain determinations (or

privilege geological claims) over others in a manner that would be hard to logically sustain.

Second, as explained above, the act also was intended to provide authority to preserve artifacts that might otherwise be looted. Even assuming the original designation was proper, if the relevant artifacts were excavated and removed and are now on display in a museum off-site, how can it be said that the reserved parcels are currently the “smallest areas compatible with the proper care and management of the objects to be protected”? If any of these changes of fact or scientific interest justify revocation, then the general argument against revocation would be on shaky grounds, and discretionary revocations at will would be a more plausible interpretation of the act.

**Problems of Size.** A presidential determination that the original designation was illegally or inappropriately large is a special case. It may provide a sound predicate for declaring a designation to be invalid in some cases or for significantly reducing the monument’s size in others. The president might be presented with an issue analogous to a severability determination regarding such monuments. If there is no reasonable way to reduce a reservation’s size and maintain a meaningful monument, rescinding or declaring invalidity may be more appropriate. In all events, a review of controversies over the size of national monuments highlights three distinct periods of use and abuse, the last of which contains the most breathtakingly large monument designations.

Between 1906 and 1943, most monument reservations were smaller than 5,000 acres, and many of them actually protected antiquities. Yet there also were several large monument reservations or expansions during that period, mostly for scenic or geological formations.

President F. Roosevelt’s designation of Jackson Hole National Monument in 1943 was the catalyst for two reforms, only one of which was made permanent. Wyoming congressmen were strongly opposed to the 210,950-acre Jackson Hole monument and reservation and secured a bill to overturn it, but President Roosevelt vetoed it. In 1950, Congress made Grand Teton National Park out of most of the land from the Jackson

Hole monument and added the southern portion of the former monument to the National Elk Refuge. That law also amended the Antiquities Act, forbidding further use of it to expand or establish a national monument in Wyoming without express congressional authorization.<sup>39</sup> Note that the proviso enacted in 1950 does not prohibit the president from reducing the size of the monument reservation in Wyoming.

For 35 years after the congressional dispute over the Jackson Hole National Monument, presidents were quite temperate in their use of the Antiquities Act. Except for a couple of proclamations of large tracts by President Johnson, the period between 1943 and 1978 contained no especially vast monument reservations, and some presidents even reduced the size of older monuments. Eisenhower’s combined proclamations under the act caused a net reduction in total acreage devoted to national monuments. President Nixon issued no Antiquities Act proclamations whatsoever.

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA), which prevents a secretary of interior from withdrawing more than 5,000 acres of federal land without congressional approval. The FLPMA did not alter the president’s authority under the Antiquities Act, perhaps because presidential abuses had abated. Although one ambiguous sentence of one House committee report has been mistakenly read to provide otherwise, the plain text of the FLPMA and settled canons of construction establish that the president’s authority under the Antiquities Act was not affected by a provision that limited the secretary of interior’s authority regarding similar land withdrawals.<sup>30</sup>

Unfortunately, presidential abuses under the Antiquities Act expanded significantly after 1978, especially by Presidents Carter, Clinton, and Obama. Until a few months ago, President Carter held the record for the most extensive monument reservations, with nine designations that were larger than a million acres and two larger than 10 million acres. Carter’s designation of more than 56 million acres of monument reservations in Alaska on a single day led to the most recent amendment to the Antiquities Act.

The Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, was enacted by Congress and signed by President Carter on December 2, 1980, after his election loss to Reagan and the impending loss of Democratic Party control in the Senate. The ANILCA settled many long-standing issues and land disputes, and it made many Alaska-specific changes to laws governing federal land management, including requiring congressional approval for national monuments in Alaska larger than 5,000 acres.<sup>31</sup> Whether this congressional reaction made an impression on them or for other reasons, Presidents Reagan and George H. W. Bush both issued no proclamations under the Antiquities Act.

### **Several of President Obama's proclamations were also in the teeth of strong congressional opposition and undermined pending congressional legislation.**

Nevertheless, President Clinton broke new ground with the number of monument designations per term,<sup>32</sup> many of which were larger than 100,000 acres and two of which were larger than one million acres.<sup>33</sup> He also proclaimed a questionable new type of monument on the high seas. President George W. Bush issued fewer than half as many monument designations as Clinton, and some were relatively small. Yet, President George W. Bush made a few large monument designations, including a questionable designation along the Pacific Ocean's Marianas Trench.<sup>34</sup>

President Barack Obama broke both Clinton's record number of monument proclamations per term and Carter's record for the total acres withdrawn.

Among his 34 proclamations,<sup>35</sup> Obama enlarged the Papahānaumokuākea Marine National Monument by approximately 283.4 million acres,<sup>36</sup> enlarged the Pacific Remote Islands Marine National Monument by approximately 261.3 million acres,<sup>37</sup> and created the Northeast Canyons and Seamounts Marine National Monument, which covers approximately 3.1 million acres.<sup>38</sup>

Several of President Obama's proclamations were also in the teeth of strong congressional opposition and undermined pending congressional legislation. For example, on December 28, 2016, he created the 1.35 million-acre Bears Ears National Monument in southern Utah and the 300,000-acre Gold Butte National Monument in Nevada. Both designations were opposed by state officials and GOP congressional leaders, including the unanimous congressional delegation from Utah, which was willing to compromise on a smaller monument in Utah that permitted reasonable public uses of the area. The protective impact of the Bears Ears National Monument is particularly dubious since it is supposed to protect isolated Native American sites. It is unclear, for example, how the agency officials will protect those sites any differently after the monument designation than they might have before.

A designation smaller than 5,000 acres may still be too large (relative to some objects being protected) or politically abusive if the designation is for a questionable purpose, for example, to interfere with congressional deliberations over a compromise land-use arrangement or to regulate fishing that is not otherwise authorized. But reservations larger than 5,000 acres merit special review out of respect for Congress' traditional authority to establish federal land policy, especially if there was no "emergency" necessitating the monument designation without congressional action or if congressional leaders had expressed serious opposition to the monument designation.

If a president makes a credible determination, based on the facts and a reasonable interpretation of the act, that some former monuments are illegally large relative to the original "object" supposedly being protected, he could declare that the initial designation was void, especially if there is no easy way to make it lawful by severing discrete parcels of land.

That is distinct from his power to “revoke” those he thinks were originally lawful, and it would stem from his constitutional authority to take care that the laws are faithfully executed. Even so, a president trying to insulate such a decision should invoke both his constitutional authority to declare the prior designation void and his authority under the act to revoke the designation if it were legal. If he uses both sources of authority, he should issue a proclamation to exercise his authority under the Antiquities Act.

### Judicial Review

Someone would have to establish standing to sue to overturn a later declaration of invalidity or a revocation, and that might be quite difficult in many cases. Standing has been a hurdle for many challenging monument designations that impaired grazing, timber, mining, or other rights to use the reserved land.<sup>39</sup> It might be even more difficult for a party to establish a sufficient and particularized injury that resulted from a monument revocation that restores land to public use.

If standing is established, challengers would have to satisfy different burdens, depending on the nature of their claims. A challenge to the president’s legal authority to establish a particular monument, perhaps because the land in question is not owned or controlled by the United States,<sup>40</sup> is an issue of law that ought to be decided without deference to either party. A legal challenge to the president’s authority to ever revoke any prior monument under the act would probably be decided in a similar manner.

Someone challenging the president’s discretionary determinations under the act would likely have to show an abuse of discretion—and to do so without an administrative record. And it is possible, absent proof of corruption, legal violation, or a failure of process, that certain factual determinations are committed to the president’s discretion by law and are not subject to judicial review.<sup>41</sup> That standard might apply to presidential determinations that justify a reduction in the size of existing monuments, which is discussed further below.

### Special Questions Regarding Marine Monument Designations

The Supreme Court has upheld or discussed the application of the act to the submerged lands of two different monuments along the coast and inland waterways,<sup>42</sup> but some issues regarding these kinds of monuments still remain open, and recent marine monument designations on the high seas raise new questions.

The submerged lands under inland waterways and territorial seas at issue in the two cases mentioned above were owned by the United States when the monuments were designated. That is not true with the areas associated with certain high-sea designations by Presidents Clinton, George W. Bush, and Obama. President Obama’s most recent purported designation of the Northeast Canyons and Seamounts Marine National Monument is located approximately 130 miles off Cape Cod. This approximately 3.14 million-acre monument is in the United States’ Exclusive Economic Zone (EEZ), but under domestic and international law, America does not own it. The Pacific Legal Foundation recently filed suit on behalf of a coalition of New England fishing organizations challenging the legality of the most recent marine monument, which is the first lawsuit of its kind.<sup>43</sup>

There are two problems with the designation of marine monuments far from shore under the Antiquities Act. First, the submerged land at issue is not the type of land that the United States could have owned or controlled in 1906. The modern EEZ is not only vastly wider than the “territorial waters” of 1906 but also a qualitatively different type of property interest than the United States may have acquired or controlled in an earlier era.<sup>44</sup> The United States had a sovereign interest in the submerged land near its coast and its territorial waters (whether that was then three miles from the coast and is now 12 miles), which justifies sovereign military and economic controls; it could not have and still does not have such a sovereign interest in the area beyond its territorial waters.<sup>45</sup> Relatedly, even current domestic and international law permits only limited regulation or control of the marine and wind resources in the EEZ outside our

territorial waters, and thus, it does not constitute the type of federal government “control” of the relevant land that is required under the Antiquities Act.

In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*,<sup>46</sup> the Fifth Circuit held that the Antiquities Act does not extend beyond the territorial sea, despite subsequent legislation authorizing federal regulation beyond it. Although the Fifth Circuit acknowledged that the federal government’s role in regulating beyond the territorial seas had expanded since 1906, including through the adoption of the Outer Continental Shelf Lands Act,<sup>47</sup> none of that conveyed the degree of control that the federal government enjoyed on federally owned lands or federally controlled territories in 1906.<sup>48</sup>

When President Clinton proposed to designate the first marine monument beyond American territorial waters, he received some surprising pushback from the Departments of Interior and Commerce, which submitted a joint memorandum to OLC asserting that the EEZ is not “owned or controlled by the Federal Government.” OLC ultimately disagreed but acknowledged that it was a “closer question” than earlier disputes over the president’s designation authority.<sup>49</sup>

We believe that the OLC opinion is flimsy and that the attorney general or White House counsel should request a reconsideration of it as well. The Clinton-era OLC opinion argues that the EEZ is sufficiently controlled by the federal government because recent presidents have consistently asserted *some* regulatory authority over the area and the United States has greater regulatory authority than any foreign government.<sup>50</sup> Of course, the same is true of many areas that are unquestionably *not* “owned or controlled by the Federal Government.”

Private lands in the United States, for instance, are subject to federal regulation under the Commerce Clause, and no other nation can claim an authority to regulate them. But this does not mean the president has the authority to unilaterally designate privately owned lands as a monument. The Antiquities Act confirms this, stating that the president can receive privately owned lands to include them in a monument, but only through the owner’s voluntary

relinquishment of them.<sup>51</sup> The OLC opinion cannot be squared with this.

It also asserts that the EEZ is sufficiently controlled by the federal government because it has the authority to protect threatened or endangered species found there.<sup>52</sup> Yet the same could be said of any privately owned land under the Endangered Species Act.<sup>53</sup>

The OLC opinion has other problems, but its main defect is the failure to effectively grapple with the federal government’s limited power to regulate in the EEZ. Rather than address whether this affects the president’s ability to designate a monument in this area, the opinion instead argues that the regulations imposed within the monument are limited by the customary international law that otherwise applies. However, that cannot be squared with the Antiquities Act. In 1906, land owned or controlled by the federal government described federally owned land and federal territories in which the federal government had almost no limits on its authority and could exercise its full police power. Consistent with that, the Antiquities Act *requires* monuments to be regulated as necessary to effectuate the statute’s purposes. For these reasons, we think the OLC opinion in 2000 is erroneous.

Finally, even if the Antiquities Act does allow monument designations in international submerged lands in the United States’ EEZ, such designations might be valid only for the seabed itself and for the purpose of seabed protection. If so, that would provide additional authority to revoke designations that are primarily designed to protect sea life in international waters and remove other restrictions in ocean habitat, even if they are above seabed features that might be the subject of protection. To be clear, other authority exists to regulate fishing and other activity in the oceans, but it is questionable whether the Antiquities Act provides such authority.

The act’s text provides strong support for limiting monuments to landmarks and objects on the land and further limits reservations relating to such monuments to parcels “of land.” In particular, the act provides authority for monument designations of only “landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are

situated *upon the land*,” and when such monuments are designated, the president may then “reserve as part thereof parcels of *land*” for protection (emphasis supplied). There may be some ancillary power to regulate the air above a monument or some activity in the sea above a marine monument (see discussion of *Cappaert v. United States* below), but it is doubtful that the ocean itself and its living denizens can be designated as part of the monument. It is equally doubtful that a reservation of land can encompass the water column as a matter of presidential discretion under the Antiquities Act.

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### **The act’s text provides strong support for limiting monuments to landmarks and objects on the land and further limits reservations relating to such monuments to parcels “of land.”**

In *Cappaert*, the Supreme Court upheld some authority to regulate the immediate watershed outside a monument if that is necessary to protect geologic structures and endangered wildlife in the monument grounds, but its holding was based on other federal law governing reserved water rights.<sup>54</sup> The Court did mention the endangered fish that swim in the unmovable pool of the monument at issue, but that reference does not seem necessary to its holding that appurtenant water outside the monument was reserved. The facts of that case are distinguishable in other ways from the unbounded ocean and the

unthreatened fish, mammals, and other sea creatures that swim in and out of it.

*Yates v. United States*<sup>55</sup> supports one such distinction. If a “fish” is not a “tangible object” within the meaning of Sarbanes-Oxley law because it is not like the other listed things that should be protected from shredding,<sup>56</sup> then it is even less likely that the ocean and its sea life are objects analogous to “structures” and “landmarks” that are “situated upon the land” within the meaning of the Antiquities Act. And even if the ocean and its sea life are “objects” that could be part of a monument, the Antiquities Act’s second step permits the reservation of only the “part thereof” that are “parcels of land” necessary to protect them.

Accordingly, if the ocean and its sea life cannot be designated as part of a monument, or if no reservation “of land” can include them, then their regulation must rely on some other principle of law (analogous to the federal law regarding reserved water rights) and perhaps on proof that such regulation is necessary to protect the landmark, structure, or other objects of historic or scientific interest at issue in the actual monument, such as the seamounts and underwater valleys or mountains. For these reasons, the president should be free to lift erroneous fishing restrictions that are in place solely by reason of a marine monument designation.

### **The Power to Reduce the Scope of a Reservation Pursuant to a Monument Designation**

Almost all commentators, including past opinions from the attorney general and the solicitor of interior, agree that monument boundary adjustments are permissible.<sup>57</sup> Environmentalists often seek large expansions of existing monuments. As a result, several presidents have added vast additional reservations to existing national monuments, including three by President Obama that added millions of acres to them. Many presidents have made other boundary adjustments, including some modest to large reductions, and the Supreme Court has cited some of these



changes in describing the monuments at issue, implicitly assuming they were valid.

If large additions of land have been deemed necessary to protect certain objects, it is doubtful the president could not determine that some large reductions are reasonable or necessary to satisfy the “smallest area” requirement of the act. Modern technology might even help justify a reduction, for example, if smaller boundaries may now be more effectively monitored and protected.

Yet several commentators claim that the question of whether the president could affect significant reductions remains open.<sup>58</sup> No court has ruled on the scope of downward boundary adjustments. Several commentators assert that the absence of judicial authority is because no president has attempted a significant reduction in the land reserved for a monument, but that is not true. According to the National Park Service:

- President Eisenhower reduced the reservation for the Great Sand Dunes National Monument by 25 percent. (He reduced the original 35,528-acre monument by a net 8,920 acres.)<sup>59</sup>
- President Truman diminished the reservation for Santa Rosa Island National Monument by almost half. (The original 9,500-acre reservation by F. Roosevelt was diminished by 4,700 acres.)<sup>60</sup>
- Presidents Taft, Wilson, and Coolidge collectively reduced the reservation for Mount Olympus by almost half, the largest by President Wilson in 1915 (cutting 313,280 acres from the original 639,200-acre monument).<sup>61</sup>
- The largest percentage reduction was by President Taft in 1912 to his own prior reservation in 1909 for the Navajo National Monument. (His elimination of 320 acres from the original 360-acre reservation was an 89 percent reduction.)<sup>62</sup>

There are many other reductions or adjustments to monument boundaries, but the above reductions are significant by any measure.

It is surprising that some scholars who claim expertise in this area have accepted and repeated the mistaken assertion that no substantial reductions have been made. More importantly, their position that significant reductions might be prohibited is based on a selective reading of the act's purposes and personal policy arguments instead of the text, and it is often built on the premise that authority to repeal or rescind a prior designation does not exist, including an uncritical reliance on Attorney General Cummings' questionable opinion in 1938. Under this reading of the Antiquities Act, monuments may be significantly enlarged by later presidents but never significantly reduced absent an act of Congress.

For many of the same reasons that we reject a limitation on the president's revocation power, we also question limitations on his power to substantially reduce the size of existing monument reservations. Moreover, we think there are additional reasons why the president has broad authority to alter the parcels of land reserved under existing monument designations, including logical inferences from textual provisions and the varied reasons prior presidents have given for boundary reductions that do not suggest clear limitations.

One textual command supporting boundary adjustments is that the act requires reservations to be “in all cases . . . confined to the smallest area compatible with the proper care and management of the objects to be protected.” There is no temporal limit to this requirement, and some presidential proclamations adjusting the boundaries of existing monuments recognize a continuing duty to review and comply with it. Even if boundary adjustments to date had all been somewhat minor, which is not the case, it is hard to read into the text a limiting principle that allows large additions but not large reductions.

Another textual hook is the discretionary nature of the president's authority under the Antiquities Act. The relevant language in Section 2 states that it is “in his discretion” whether to declare the national monument. It then states that he “*may* reserve as part thereof parcels of land” to protect the objects at issue (emphasis added). The parcels must, as noted above, be confined to the smallest *area* compatible with the

protective purpose, but it is still up to the president's discretion which precise parcels to designate. Apart from reducing the overall size, the next president may determine that a given monument with a patchwork of private inholdings is better protected by concentrating the monument within the federal land that the government owns and controls.<sup>63</sup> There is nothing in the act that privileges the original designation and regulations over a later presidential determination.

Moreover, there are more fundamental questions about how best to manage and protect federal property near national monuments with available resources. The belief that increasing federal regulation is always the best means of protecting something is more ideologically than empirically based, especially when it excludes all other options. Cooperation with state authorities and private property owners who own adjoining land often promotes better land-use decisions, including better protections for such properties. Such consultation and multiparty agreements tend to increase support for the resulting decisions and increase fundamental fairness, since some prior designations have walled in private lands and restricted the reasonable use of such private property.

The evidence surrounding many recent monument designations also suggests that some of the largest geological and scenic monuments were not motivated exclusively or even primarily by a desire to protect an "object" of historic or scientific interest as much as to lock up natural resources from development and use—regardless of how limited or temporary the surface disturbances would be. Such actions not only create economic hardship for local communities and injustice to those who may have reasonably depended on the timber, grazing, or mineral resources, but they may actually be counterproductive to the ecological and environmental interests that past presidents claimed to protect. For example, prohibiting fishing in vast grounds in the Atlantic or Pacific Oceans where fishermen have engaged in sustainable practices forces more concentrated activity in other areas that may trigger unsustainable impacts.

Such large monument reserves also contribute to an estimated \$13.5 to \$20 billion maintenance backlog

on Department of Interior land-management responsibilities<sup>64</sup>—and deny the federal government any reasonable return on land-use fees and leases. "Limited resources" was the primary justification for several of President Obama's executive actions that redirected enforcement resources from broader narcotics and immigration enforcement policies to those Obama designated as more important narcotics and immigration priorities. A more careful accounting of federal land policy might lead a president to conclude that some vast monument reserves, under the Antiquities Act and other acts, diffuse attention and resources from higher priorities and contribute to environmental degradation, soil erosion, and other forms of mismanagement of federal property.

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### **Prohibiting fishing in vast grounds in the Atlantic or Pacific Oceans where fishermen have engaged in sustainable practices forces more concentrated activity in other areas that may trigger unsustainable impacts.**

Apart from all that, increasing public use of vast tracts of federal land should be sufficient grounds for reducing certain prior monument reservations. The facts that underlie one Supreme Court case may prove instructive in defining possible grounds for monument reductions.

In *Alaska v. United States*,<sup>65</sup> the Supreme Court affirmed its special master's recommendation regarding the federal versus state ownership of certain

submerged lands underwater near Alaska's southeast coast. Some of the land in dispute was under Glacier Bay, which is now a national park. Glacier Bay was first reserved as a national monument by President Coolidge's proclamation in 1925 and later enlarged by President F. Roosevelt's proclamation in 1939, both pursuant to the Antiquities Act. In describing the relevant lands in question, the Court also noted that President Eisenhower "slightly altered" the monument's boundaries in 1955.

The Supreme Court accepted without discussion that the addition by Roosevelt and the "altered" boundaries by Eisenhower were valid. The monument was made part of the Glacier Bay National Park by an act of Congress in 1980, but since the status of the land in 1959 (when Alaska was made a state) was the critical focus of its analysis, the national park act was not particularly relevant to that determination. The Court did not discuss the Eisenhower proclamation further, but that proclamation reduced the size of the Glacier Bay National Monument in three ways without any land swaps or additions to counter those reductions. More importantly, the grounds Eisenhower provided for that reduction are historically interesting and legally relevant.

In Proclamation 3089 on March 31, 1955,<sup>66</sup> Eisenhower reduced the size of Glacier Bay National Monument for three different reasons. One ground was that some lands "including several homesteads which were patented prior to the enlargement of the monument [by Roosevelt] are suitable for a limited type of agriculture use and are no longer necessary for the proper care and management of the object of scientific interest on the lands within the monument." Although Proclamation 3089 provides no further explanation of this exclusion, it is fair to read it as concluding that the original inclusion of this land was mistaken and, perhaps as important, that the lands were *no longer* necessary for the proper care of the objects of scientific interest in the monument.

The second reduction in the size of Glacier Bay National Monument was based squarely on Eisenhower's conclusion that such lands should have been included in Tongass National Forest instead

of the national monument in 1939, when Roosevelt enlarged it, "and such lands are suitable for national-forest purposes." Eisenhower determined that the earlier inclusion of these lands in the monument was in error, since their exclusion from the forest was "erroneous." He did not specifically declare that they were "no longer necessary" to the proper care of the objects of scientific interest in the Glacier Bay National Monument, but he must have concluded they were never necessary to be included or that the mistaken inclusion in 1939 was sufficient to exclude them in 1955.

The third reduction (the first mentioned in the proclamation) was because certain lands are "now being used as an airfield for national-defense purposes and are no longer *suitable* for national-monument purposes" (emphasis supplied). How land reserved in a national monument became a military airfield is not explained. In some respects, this may be the most interesting exclusion of all. Whether the earlier use of the land for an airfield was legal or not, Eisenhower asserted the authority to declare a higher government purpose for federal land that was part of a national monument and, by proclamation, to remove it from the national monument reservation. Note also that Eisenhower states that the airfield land was no longer *suitable* for inclusion in the national monument *because it was an airfield*, not that the land was otherwise unsuitable for inclusion in the monument. Would the same reasoning apply if it were not yet an airfield?

And while Eisenhower's total reductions in the size of Glacier Bay National Monument were not great relative to the monument's overall size, they were not trivial either. According to the National Park Service, the reductions total more than 4,100 acres of submerged land and 24,900 acres of other land.<sup>67</sup> Most national monuments before 1955 were not 29,000 acres, so the reductions were large in an absolute sense. Moreover, some of President Eisenhower's other monument reductions constituted a larger proportion of the original size of the monument (e.g., Great Sand Dunes), and earlier presidential reductions were even greater, as discussed above.

Attempts to argue from the act's broad purposes that significant reductions would not be authorized are as conclusory as Cummings' analysis of the revocation issue. Reasoning from selective, broad protective purposes can always yield the desired result. We reach the opposite conclusion based on the text discussed above and consideration of all the act's purposes, the original compromises the act incorporated, and separation of powers principles.

Subsequent congressional land-management statutes do not change the Antiquities Act, but they cut sharply against the policy argument that the act's use is necessary to promptly secure land that is otherwise prone to looting or harmful development. Indeed, these more recent laws provide the same or superior protection without undermining Congress' primary role in federal land-use decisions. Of special note, the secretary of interior now has statutory authority to make emergency withdrawals of federal land with few limitations (and none relating to size), including land not under his department's jurisdiction, which expire no later than three years after they are withdrawn.<sup>68</sup>

Thus, one cannot truthfully defend the president's power to lock up land from reasonable public uses in perpetuity as an "emergency" measure to stop imminent harm, no matter how often some make this claim. Yet monument declarations do have one powerful, immediate effect: They stop or inhibit ongoing congressional debate and potential compromise over the land at issue—which is often the unstated goal. Congress has withdrawn many federal lands for heightened protection, but its background law and representative principles balance the interests of multiple stakeholders. Defenders of Antiquities Act abuse regularly implore the president to preempt or interfere with Congress' deliberations. Even so, they cannot reasonably argue that presidential authority under the act can work only in one direction and that the interest of the states and other citizens cannot be reconsidered.

Returning to the text of the act, we have previously noted that it would have to be tortured extensively to yield a manageable standard that allows permissible "minor" boundary changes and large "additions"

but forbids "significant" reductions. Eisenhower's Proclamation 3089, and perhaps others, proves that reductions have been recognized as valid even without further additions or other "enhancements" based on later presidential determinations. It was enough for a president to declare that certain lands: (1) were mistakenly included in the original designation, (2) are no longer necessary to be included, or (3) serve some higher federal purpose.

If the president can revoke prior monuments altogether, there is no strong argument that he lacks a lesser power to significantly reduce the land withdrawn for one. But even if the president lacks the power to revoke a monument, past practice includes proclamations that reduced some monuments to a fraction of their current size, such as President Taft's 89 percent reduction of the Navajo Nation Monument. Moreover, we think the courts are more likely to uphold significant reductions if the president could credibly include in his determination that the original designation was inappropriately large relative to the object to be protected or has become so with changed circumstances.

It would bolster his position if the president includes any existing site-specific justifications for reducing the particular monument's land reservation. For example, a president might issue a proclamation determining that limited resources prevent proper management of the largest national monuments, that other authority now exists for the excluded parcels to be regulated and managed (including perhaps a management plan for them), that changed technology or other changed circumstances allow a smaller area to be designated to protect the objects in question, or that other changed circumstances warrant such reductions.

The president's authority to significantly reduce the size of an existing monument would be less certain if the Supreme Court or other appellate court ruled that he lacked a general discretionary authority to revoke prior monument designations. But even then, we think the president would retain the authority, if not the duty, to reduce the size of existing monuments that were unreasonably large relative to the objects being preserved—or have become illegally

large with changed circumstances. And such determinations should be entitled to the same or similar respect as the original reservations.

As with a complete revocation, someone would have to establish standing to sue to overturn a proclamation reducing the size of a monument, and that might be difficult in many cases. And even if standing is established, we think the challenger would have a significant burden to prove in order to prevail. If the challenge were based on a factual determination, such a challenger might have to prove an abuse of discretion to overcome the president's more recent determinations under the act, or the courts might hold that some determinations under the act are textually committed to the president's absolute discretion (absent corruption or a procedural failure) and not subject to judicial review.

#### **The Power to Modify a Monuments' Management Conditions and Restrictions**

In addition to revoking a monument or significantly altering its boundaries, a president could change some of the restrictions on management grounds if he determines that it still properly protects the "objects" of scientific or historic interest. Accordingly, a president could "transfer the management of a monument from one agency to another; expand, authorize, or prohibit uses such as mining or grazing; or allow new rights-of-way across the lands."<sup>69</sup> Recent monument proclamations tend to contain more detailed management plans than earlier proclamations,<sup>70</sup> which relied on the statutory authority of the agency secretary delegated to oversee the monument to issue regulations for managing it.<sup>71</sup>

Restrictions or allowances set forth in the original proclamation would need to be changed by a subsequent proclamation, unless the proclamation delegated that authority to the relevant agency official. Although the FLPMA limits the power of the secretary of interior to modify or revoke an actual monument designation or the land withdrawn, it does not change the secretary's power under the Antiquities

Act to alter the monument's management plan when that is consistent with the underlying proclamation.

There should be no doubt that the president can modify land-use restrictions. As early as 1936, President Franklin Roosevelt issued a proclamation expressly making the restrictions on Katmai National Monument "subject to valid claims under the public-land laws . . . existing when the proclamations were issued and since maintained."<sup>72</sup> And nothing in the act's text limits the president's authority to change restrictions or uses for the land withdrawn.

Nevertheless, those who believe revocation is not permissible also raise questions about the "scope of this authority . . . to the extent that greatly reducing a monument's restrictions or expanding its uses can be analogized to effectively abolishing the monument."<sup>73</sup> That is not an inconsistent argument, but it is based almost entirely on the flawed premise that presidents are prohibited from revoking or significantly reducing the land withdrawn for any prior monument.

#### **Conclusion**

We have argued that the president retains a general discretionary power to revoke prior monument designations pursuant to the Antiquities Act. It is a general principle of government that the authority to execute a discretionary power includes the authority to reverse the exercise of that power. This power is at its height when prior designations were made illegally or in contravention of the act's mandate that designations be reasonable in size.

Moreover, the purpose of the act supports the president in his ability to respond to new factual determinations or changes in circumstance that require modification of a monument's boundaries. The plain language of the act, its legislative purpose, and the practice of past presidents all support this conclusion. Most importantly, it is compelled by the constitutional principle of separation of powers. If presidents choose not to protect their policies through Congress' bicameral process, they leave those policies vulnerable to their successors by constitutional design.

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Cover image: Valley of the Gods in Bears Ears National Monument, Bureau of Land Management, Creative Commons. Photo by Bob Wick, BLM, <https://www.flickr.com/photos/mypubliclands/31136248533>.

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## Notes

1. Percy Shelley's 1818 poem "Ozymandias" is about the ruins of an ancient kingdom, whose stern but long-dead ruler declared it would last forever and make men tremble in despair. All that remains in modern times is a wrecked statue of the king, his boastful claim on its pedestal, and sand all around. For the text and history of the poem, see *Economist*, "The Real Ozymandias: King of Kings," December 18, 2013, <http://www.economist.com/news/christmas-specials/21591740-enthusiasms-rivalries-fads-and-fashions-lie-behind-shelleys-best-known-poetry-and-rulers-vainly-asserting-the-permanence-of-their-works-however-are-more-timeless>.
2. US Department of Interior, Rept. to Secretary of the Interior for Fiscal Year Ended June 30, 1909, 486-87.
3. Ronald F. Lee, "The Antiquities Act, 1900-1906," in *The Story of the Antiquities Act* (National Park Service, March 15, 2016), [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH6.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH6.htm).
4. See Pub. L. 59-209, 34 Stat. 225 (June 8, 1906), now codified at 54 U.S.C. §§ 320301-03.
5. See Lee, "The Antiquities Act, 1900-1906," discussing Congress' refusal in the period before the Antiquities Act to pass five bills that sought to grant the secretary of the interior broad authority for designating national parks.
6. *Ibid.* ("The reluctance of the members of the Public Lands Committee, most of them western public lands states, to grant general authority to the Executive Branch to create new national parks is understandable in the light of their past experience with the timber reservations act of 1891.")
7. Although the National Park Service currently manages most existing national monuments, other units of the Department of Interior (the Bureau of Land Management and the US Fish and Wildlife Service) manage or comanage others. See list of national monuments and their corresponding management agencies at National Parks Conservation Association, "Monuments Protected Under the Antiquities Act," January 13, 2017, <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act/#sm.0000opyor17d8qfp5wxdeb7uvkeow>. The original act contemplated that the Departments of Agriculture and Defense (then War) might also manage or relinquish land for national monuments and specified that the secretaries of interior, agriculture, and war had authority to jointly issue uniform regulations for managing national monuments. In recent decades, presidents have given responsibility to the National Oceanic and Atmospheric Administration (in the Department of Commerce) to manage or comanage marine monuments, and the US Forest Service (in the Department of Agriculture) manages or comanages certain other recent monuments.
8. See Lee, "The Antiquities Act, 1900-1906."
9. 252 U.S. 450 (1920).
10. See *United States v. California*, 436 U.S. 32 (1978); and *Alaska v. United States*, 545 U.S. 75 (2005), discussed in the section titled "Special Questions Regarding Marine Monument Designations."
11. See *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to the 327,769-acre Giant Sequoia National Monument as not constituting "the smallest areas compatible with proper care and management" of the objects being protected). Although the Supreme Court has not ruled expressly on a challenge to the excessive size of a monument, the courts have deferred to many presidential determinations under the act, and challengers may have to show an abuse of discretion to prevail on a size-based claim. See discussion of judicial review in the section titled "Judicial Review." Nevertheless, *Tulare County* may be distinguishable in future challenges since the court held that the challengers failed to establish a factual basis for their claim, not that such a claim was barred. Consider one justification President Obama provided for creating the recent Bears Ears National Monument (see the section titled "Problems of Size"), which Utah officials have already said they will challenge: that it contains several ancient archeological sites. Although the proclamation also cited the area's cultural, geological, and historical significance, it is unclear how isolated archeological sites are better protected after a massive 1.35 million acre monument designation that incorporates all of them than before the designation, especially when the same two federal agencies (the US Forest Service and the Bureau of Land Management) will each manage the same areas after the designation as before it.
12. Proposed Abolishment of Castle Pinkney Nat'l Monument, 39 Op. Att'y Gen. 185 (1938).

13. The solicitor of interior cited the opinion in 1947 but for a different proposition, namely that the president can alter the boundaries of a national monument. See “National Monuments,” *Interior Decisions* 60 (1947): 9.

14. 39 Op. Att’y Gen. 186.

15. *Ibid.*, 188.

16. Rock Island Military Reservation, 10 Op. Att’y Gen. 359 (1862).

17. *Ibid.*, 364.

18. The Homestead Act of 1862 revised this law, significantly reducing the number of “preemption” claims. But Bates was addressing the rights of settlers who may have occupied the former military property before 1862.

19. See Uniform Trust Code: Revocation or Amendment of Revocable Trust § 602(a) (2010) (“Unless the terms of a trust expressly provide that the trust is irrevocable”).

20. See Restatement (Third) of Trusts: Power of Settlor to Revoke or Modify § 63 (2003).

21. See, e.g., *Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855-56 (D.C. Cir. 1974).

22. See *ibid.*

23. 347 U.S. 483 (1954).

24. 163 U.S. 537 (1896).

25. Exec. Orders Nos. 11821, 39 F.R. 41501 (1974) (Ford); 12044, 43 F.R. 12661 (1978) (Carter); 12291, 46 F.R. 13193 (1981) (Reagan); 12866, 58 F.R. 51735 (1993) (Clinton); 13258, 67 F.R. 9385 (2002), and 13422, 72 F.R. 2763 (2007) (G. W. Bush); and 13497, 74 F.R. 6113 (2009) (Obama).

26. 272 U.S. 52 (1926).

27. See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), vacated by *Goldwater v. Carter*, 444 U.S. 996 (1979); and *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).

28. See *INS v. Chadha*, 462 U.S. 919 (1983).

29. 64 Stat. 849 (1950), codified at 54 U.S.C. § 320201(d) (“No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress”).

30. The FLPMA expressly limits agency officials’ authority to “modify or revoke” national monuments created by the president under the Antiquities Act or other monuments created by Congress, but that simply confirms the natural reading of the Antiquities Act, which grants authority to the president alone to specify the parcels of land withdrawn for any monument created pursuant to the act. It should not be read to raise doubts about the president’s authority to modify or revoke national monuments, as two Congressional Research Service reports (R44687 and RS20647) have suggested. FLPMA §204(j), 43 U.S.C. § 1714(j) provides:

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act.* (emphasis supplied)

This restriction on the secretary’s power creates no inference that Congress modified the president’s authority in the Antiquities Act, and repeals by implication are strongly disfavored even if such an inference existed. The opposite reading of the text is much stronger, i.e., that Congress knew how to write express limitations and that it would have listed the president if its restriction on the secretary of interior’s power was intended to bind the president. The lone sentence in a House report cited for the contrary view is, at best, itself ambiguous, but even unambiguous legislative history material is irrelevant when the statutory text is clear.

31. See 16 U.S.C. § 3213.

32. President Obama’s 34 designations also overtook the previous record set by President Franklin Roosevelt, with 33 monument proclamations. See Juliet Elperin and Brady Dennis, “Obama Names Five New National Monuments, Including Southern Civil Rights Sites,” *Washington Post*, January 12, 2017, [https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e\\_story.html](https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html). All presidents since 1906 have issued such proclamations except Presidents Nixon, Reagan, and George H. W. Bush. National Park Service, “National



Monuments Designated by Presidents 1906–2009,” [https://www.nps.gov/parkhistory/hisnps/NPSHistory/national\\_monuments.pdf](https://www.nps.gov/parkhistory/hisnps/NPSHistory/national_monuments.pdf). According to the National Parks Conservation Association, 157 monuments have been created under the Antiquities Act. See National Parks Conservation Association, “Monuments Protected Under the Antiquities Act.” A few have been abolished by Congress. See National Park Service, “About ‘Abolished’ Monuments,” March 15, 2016, <https://www.nps.gov/archeology/sites/antiquities/abolished.htm>. And the land constituting Papago Saguaro National Monument was conveyed to the state of Arizona for public purposes. See 54 U.S.C.A. § 320301 note, citing Pub. L. 92, 71st Cong., Apr. 7, 1930, c. 107, 46 Stat. 142.

33. See Albert C. Lin, “Clinton’s National Monuments: A Democrat’s Undemocratic Acts?,” *Ecology Law Quarterly* 29 (2002): 718–19.

34. Bryan Walsh, “President Bush’s Last Act of Greenness,” *Time*, January 6, 2009, <http://content.time.com/time/health/article/0,8599,1869917,00.html> (noting that President Bush will have “protected more ocean than anyone else in the world”).

35. Eilperin and Dennis, “Obama Names Five New National Monuments”; and Dana Varinsky, “Here’s Every Piece of Land Obama Has Put Under Protection During His Presidency,” *Business Insider*, January 16, 2017, <http://www.businessinsider.com/every-piece-of-land-obama-has-protected-2017-1/cascade-siskiyou-national-monument-1>.

36. Papahānaumokuākea.gov, “President Announces Expansion of Papahānaumokuākea,” [http://www.papahanaumokuakea.gov/news/expansion\\_announcement.html](http://www.papahanaumokuakea.gov/news/expansion_announcement.html).

37. Bryan C. Howard, “US Creates Largest Protected Area in the World, 3x Larger Than California,” *National Geographic*, September 26, 2014, <http://news.nationalgeographic.com/news/2014/09/140924-pacific-remote-islands-marine-monument-expansion-conservation/>.

38. The White House, Office of the Press Secretary, “Fact Sheet: President Obama to Continue Global Leadership in Combatting Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean,” September 15, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate>. See also the later section discussing unique problems with monument designations of submerged land under the high seas and a citation to Pacific Legal Foundation’s recent lawsuit challenging the legality of the Northeast Canyons and Seamounts Marine National Monument.

39. See *Utah Assoc. of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004) (cataloguing cases).

40. See the section titled “Special Questions Regarding Marine Monument Designations” for discussion of legal issues related to questionable marine monuments on the high seas.

41. See *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (discussing judicial review to challenge presidential designations under the Antiquities Act and applying an unclear but deferential standard of review to factual determinations under the act); and *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to the Giant Sequoia National Monument as not constituting “the smallest areas compatible with proper care and management” of the objects being protected).

42. See *United States v. California*, 436 U.S. 32 (1978); and *Alaska v. United States*, 545 U.S. 75 (2005).

43. Complaint, *Massachusetts Lobstermen’s Association, et al. v. Ross, et al.*, No. 1:17-cv-00406, (D.D.C. Mar. 7, 2017), 2017 WL 897829. The complaint is available at <https://www.pacificlegal.org/document.doc?id=2499>. The authors both have affiliations with Pacific Legal Foundation. Todd Gaziano is the executive director of its DC Center and is one of the attorneys for the plaintiffs in the case. John Yoo recently joined the board of Pacific Legal Foundation.

44. See also Joseph Briggett, comment, “An Ocean of Executive Authority: Courts Should Limit the President’s Antiquities Act Power to Designate Monuments in the Outer Continental Shelf,” *Tulane Environmental Law Journal* 22 (2009): 403.

45. See Restatement (Third) of Foreign Relations Law § 514 cmt. C.

46. 569 F.2d 330 (5th Cir. 1978).

47. 43 U.S.C. § 1331 et seq.

48. See *Treasure Salvors*, 569 F.2d at 337–340.

49. See Randolph D. Moss, Mem. Op. for the Solicitor, Dep’t of the Interior, General Counsel, Nat’l Oceanic and Atmospheric Admin., and General Counsel, Council on Environmental Quality (Sept. 15, 2000), <https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op-olc-v024-p0183.pdf>.

50. See *ibid.*, 196.

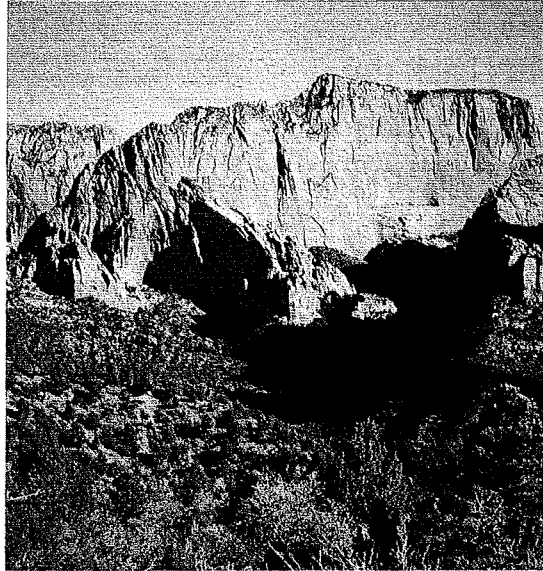
51. See 54 U.S.C. § 320301.
52. See Moss, Mem. Op. for the Solicitor, Dep't. of the Interior, 197.
53. But see *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014).
54. See *Cappaert v. United States*, 426 U.S. 128 (1976) ("when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation").
55. 135 S. Ct. 1074 (2015).
56. *Ibid.*
57. See National Monuments, 60 Interior Dec. 9 (1947), citing A. G. Cummings, 39 Op. Att'y Gen. 185 (1938).
58. Compare those who suggest there may be limitations on the president's authority to revoke or significantly reduce past monument reservations, Mark Squillace, "The Monumental Legacy of the Antiquities Act of 1906," *Georgia Law Review* 37 (2003): 473, 488; Lia. "Clinton's National Monuments," 707, 713; and Sanjay Ranchod, note, "The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act," *Harvard Environmental Law Review* 25 (2001): 535, 552, with those who simply note that the issue remains open, Alexandra Wyatt, *Antiquities Act: Scope of Authority for Modification of National Monuments*, Congressional Research Service, November 14, 2016, 5, [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRCS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRCS.pdf); Kelly Y. Fanizzo, "Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act," *Environmental Law* 40 (2010): 765, 822; Roberto Iraola, "Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906," *William & Mary Environmental Law & Policy Review* 29 (2004): 159; Scott Y. Nishimoto, "President Clinton's Designation of the Grand Canyon-Parashnat National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act," *Journal of Environmental Law and Litigation* 17 (2002): 51, 54; Pamela Baldwin, *Authority of a President to Modify or Eliminate a National Monument*, Congressional Research Service, August 3, 2000, 3; and James R. Rasband, "The Future of the Antiquities Act," *Journal of Land, Resources & Environmental Law* 21 (2001): 619, 626.
59. Michael M. Geary, "Chapter 5: Monumental Dunes," in *Sea of Sand: A History of the Great Sand Dunes National Park and Preserve* (Norman, OK: University of Oklahoma Press, 2016).
60. President Harry S. Truman, Proclamation No. 2659—Eliminating Certain Lands from the Santa Rosa Island National Monument and Reserving Them for the Use of the War Department for Military Purposes (Aug. 13, 1945), <http://www.presidency.ucsb.edu/ws/index.php?pid=87038>.
61. Gail H. E. Evans, "Appendix A: A Chronology of the Public Domain," in *Historic Resource Study* (National Park Service, 1983), [https://www.nps.gov/parkhistory/online\\_books/olym/hrs/appa.htm](https://www.nps.gov/parkhistory/online_books/olym/hrs/appa.htm).
62. Hal K. Rothman, "Chapter 2: Founding Navajo National Monument," in *Navajo National Monument: A Place and Its People: An Administrative History* (National Park Service, 1991), [https://www.nps.gov/parkhistory/online\\_books/nava/adhi/adhi2e.htm](https://www.nps.gov/parkhistory/online_books/nava/adhi/adhi2e.htm).
63. See, e.g., *Wilkerson v. Dept. of the Interior*, 634 F. Supp. 1265 (D. Col. 1986), holding that the United States could not completely restrict travel on a preexisting right of way through a national monument.
64. Hearing before the Subcomm. on the Interior, Environment, and Related Agencies of the H. Committee on Appropriations, (2001) (statement of Anu K. Mittal and Frank Rusco), <http://www.gao.gov/assets/130/125531.pdf>.
65. 545 U.S. 75 (2005).
66. President Dwight D. Eisenhower, Proclamation No. 3089—Excluding Certain Lands from the Glacier Bay National Monument and Adding a Portion Thereof to the Tongass National Forest (Mar. 31, 1955), <http://www.presidency.ucsb.edu/ws/?pid=107264>.
67. Theodore Catron, "Chapter VII: Private Interests and A Second Boundary," in *Land Reborn: A History of Administration and Visitor Use in Glacier Bay National Park and Preserve* (Anchorage, AL: National Park Service, 1995), [https://www.nps.gov/parkhistory/online\\_books/glbay/adhi/chap7.htm](https://www.nps.gov/parkhistory/online_books/glbay/adhi/chap7.htm).
68. 43 U.S.C. §§ 1714(c) and 1714(f).
69. Wyatt, *Antiquities Act*, 5. The Supreme Court has recognized the president's power to shift responsibility to manage the land withdrawn in the initial proclamation declaring the monument from one agency to another, *California v. United States*, 436 U.S. 32, 40 (1978), and there is no reason to think the president cannot shift that responsibility again in subsequent proclamations.

70. Compare President Barack Obama, Proclamation No. 9496 (Sept. 21, 2016), <https://www.gpo.gov/fdsys/pkg/DCPD-201600596/pdf/DCPD-201600596.pdf>, with President Franklin D. Roosevelt, Proclamation No. 1950 (April 24, 1931), reprinted in US Department of the Interior, Proposed Katmai National Park, Alaska: Final Environmental Statement 527 (1974).

71. See 54 U.S.C. 320302 (“The Secretary, the Secretary of Agriculture, and the Secretary of the Army shall make and publish uniform regulations for the purpose of carrying out this chapter”).

72. President Franklin D. Roosevelt, Proclamation No. 2177 (1936).

73. Wyatt, *Antiquities Act*, 5.



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## PRESIDENTS LACK THE AUTHORITY TO ABOLISH OR DIMINISH NATIONAL MONUMENTS

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# Presidents Lack the Authority to Abolish or Diminish National Monuments

## Introduction

By any measure, the Antiquities Act of 1906 has a remarkable legacy. Under the Act, 16 presidents have proclaimed 157 national monuments, protecting a diverse range of historic, archaeological, cultural, and geologic resources.<sup>1</sup> Many of these monuments, including such iconic places as the Grand Canyon, Zion, Olympic, and Acadia, have been expanded and redesignated by Congress as national parks.

While the designation of national monuments is often celebrated, it has on occasion sparked local opposition, and led to calls for a President to abolish or shrink a national monument that was proclaimed by a predecessor.<sup>2</sup> This article examines the Antiquities Act and other statutes, concluding that the President lacks the legal authority to

abolish or diminish national monuments. Instead, these powers are reserved to Congress.

## The Authority to Abolish National Monuments

The Property Clause of the Constitution vests in Congress the “power to dispose of and make all needful rules and regulations respecting [public property].”<sup>3</sup> The U.S. Supreme Court has frequently reviewed this power in the context of public lands management and found it to be “without limitations.”<sup>4</sup> Congress can, however, delegate power to the President or other members of the executive branch so long as it sets out an intelligible principle to guide the exercise of executive discretion.<sup>5</sup>

Congress did exactly this when it enacted the Antiquities Act and delegated to the President the power to “declare by public proclamation” national monuments.<sup>6</sup> At the same time, Congress did not, in the Antiquities Act or otherwise, delegate to the President the authority to revoke the designation of monuments. Further, the Federal Land Policy and Management Act of 1976 (FLPMA) makes it clear that the President does not have any implied authority to do so, but rather that Congress reserved for itself the power to modify or revoke monument designations.

<sup>1</sup> See National Parks Conservation Association, *Monuments Protected Under the Antiquities Act*, Jan. 13, 2017, <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act>.

<sup>2</sup> On April 26, 2017, President Trump issued an Executive Order calling for the Secretary of the Interior to review certain national monument designations made since 1996. *Presidential Executive Order on the Review of Designations Under the Antiquities Act*, Apr. 26, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-review-designations-under-antiquities-act>. The Order encompasses Antiquities Act designations since 1996 over 100,000 acres in size or “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders[.]” *Id.* § 2(a). The Order asks the Secretary to make “recommendations for . . . Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out” the policy described in the Order. *Id.* § 2(d)-(e).

<sup>3</sup> U.S. Constitution, Art. IV, § 3, cl. 2.

<sup>4</sup> See *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 [1940].

<sup>5</sup> *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). The Supreme Court has also made clear that any delegation of legislative power must be construed narrowly to avoid constitutional problems. *Mistretta v. United States*, 488 U.S. 361, 373, n.7 (1989).

<sup>6</sup> 54 U.S.C. § 320301(a).

## The Antiquities Act does not grant authority to revoke a monument designation

The United States owns about one third of our nation's lands.<sup>7</sup> These lands, which exist throughout the country but are concentrated in the western United States, are managed by federal agencies for a wide range of purposes such as preservation, outdoor recreation, mineral and timber extraction, and ranching. Homestead, mining, and other laws transferred ownership rights over large areas of federal lands to private parties. At the same time, vast tracts of land remain in public ownership, and these lands contain a rich assortment of natural, historical, and cultural resources.

Over its long history, Congress has "withdrawn," or exempted, some federal public lands from statutes that allow for resource extraction and development, and "reserved" them for particular uses, including for preservation and resource conservation. Congress has also, in several instances, delegated to the executive branch the authority to set aside lands for particular types of protection. The Antiquities Act of 1906 is one such delegation.

The core of the Antiquities Act is both simple and narrow. It reads, in part:

[T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and

management of the objects to be protected .....<sup>8</sup>

This narrow authority granted to the President to *reserve* land <sup>9</sup> under the Antiquities Act stands in marked contrast to contemporaneous laws that delegated much broader executive authority to designate, repeal, or modify other types of federal reservations of public lands. For example, the Pickett Act of 1910 allowed the President to withdraw public lands from "settlement, location, sale, or entry" and reserve these lands for a wide range of specified purposes "*until revoked by him or an Act of Congress.*"<sup>10</sup> Likewise, the Forest Service Organic Administration Act of 1897 authorized the President "to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification *may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.*"<sup>11</sup>

Unlike the Pickett Act and the Forest Service Organic Administration Act, the Antiquities Act withholds authority from the President to change or revoke a national monument designation. That authority remains with Congress under the Property Clause.

This interpretation of the President's authority finds support in the single

<sup>8</sup> As in the original. 34 Stat. 225 (1906). The language of the Act was edited and re-codified in 2014 at 54 U.S.C. § 320301(a)-(b) with the stated intent of "conform[ing] to the understood policy, intent, and purpose of Congress in the original enactments[.]" Pub. L. 113-287, §§ 2-3, 128 Stat. 3093, 3094, 3259 (2014).

<sup>9</sup> In an opinion dated September 15, 2000, the Office of Legal Counsel in the Department of Justice found that the authority to reserve federal land under the Antiquities Act encompassed the authority to proclaim a national monument in the territorial sea, 3-12 nautical miles from the shore, or the exclusive economic zone, 12-200 nautical miles from the shore. *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, 24 Op. O.L.C. 183 (2000), available at [https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op-olc-v024-p0183\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op-olc-v024-p0183_0.pdf).

<sup>10</sup> 36 Stat. 847 (1910) (emphasis added).

<sup>11</sup> 30 Stat. 36 (1897) (emphasis added).

<sup>7</sup> See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

authoritative executive branch source interpreting the scope of Presidential power to revoke monuments designated under the Act: a 1938 opinion by Attorney General Homer Cummings. President Franklin D. Roosevelt had specifically asked Cummings whether the Antiquities Act authorized the President to revoke the Castle Pinckney National Monument. In his opinion, Cummings compared the language noted above from the Pickett Act and the Forest Service Organic Act with the language in the Antiquities Act, and concluded unequivocally that the Antiquities Act “does not authorize [the President] to abolish [national monuments] after they have been established.”<sup>12</sup>

### FLPMA clarifies that only Congress can revoke or downsize a national monument

In 1976, Congress enacted the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>13</sup> FLPMA governs the management of federal public lands lacking any specific designation as a national park, national forest, national wildlife refuge, or other specialized unit. The text, structure, and legislative history of FLPMA leave no doubt that the President does not possess the authority to revoke or downsize a monument designation.

FLPMA codified federal policy to retain, rather than dispose of, the remaining federal public lands, provided for specific procedures for land-use planning on those lands, and consolidated the wide-ranging legal authorities relating to the uses of those lands. Prior to FLPMA’s enactment, delegations of executive authority to withdraw public lands from development or resource extraction were dispersed among federal statutes including the Pickett Act and the Forest

Service Organic Act. Moreover, in *United States v. Midwest Oil Co.*, the Supreme Court had held withdrawal to be an implied power of the presidency in the absence of direct statutory authority or prohibition.<sup>14</sup>

FLPMA consolidated and streamlined the President’s withdrawal power: it repealed the Pickett Act,<sup>15</sup> along with most other executive authority for withdrawing lands—with the notable exception of the Antiquities Act. In place of these prior withdrawal authorities, FLPMA included a new provision – section 204 – that authorizes the Secretary of the Interior “to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section.”<sup>16</sup>

Subsection 204(j) of FLPMA somewhat curiously states that “[t]he Secretary [of Interior] shall not . . . modify, or revoke any withdrawal creating national monuments under [the Antiquities Act] . . . .”<sup>17</sup> Because only the *President*, and not the Secretary of Interior, has authority to proclaim national monuments, Congress’s reference to the *Secretary’s* authority under the Antiquities Act is anomalous and, as explained further below, may be the result of a drafting error. Nonetheless, this language does reinforce the most plausible reading of the text of the Antiquities Act: that it deliberately provides for one-way designation authority. The President may act to create a national monument, but only Congress can modify or revoke that action.

An examination of FLPMA’s legislative history removes any doubt that section 204(j) was intended to reserve to Congress the exclusive authority to modify or revoke national monuments. FLPMA’s restriction of executive withdrawal powers originated in

<sup>14</sup> 236 U.S. 459 (1915).

<sup>15</sup> FLPMA, § 704(a), 90 Stat. 2792 (1976). The authority to create or modify forest reserves was repealed previously in 1907. 34 Stat. 1269 (1907).

<sup>16</sup> 43 U.S.C. § 1714(a) (emphasis added).

<sup>17</sup> 43 U.S.C. § 1714(j). This same subsection reiterates the authority of Congress in other areas of land management, prohibiting the Secretary from modifying or revoking the designation of lands as national wildlife refuges or from affecting withdrawals that were made by Congress itself. *Id.*

<sup>12</sup> 39 Op. Att’y Gen. 185, 185 (1938).

<sup>13</sup> Federal Land Policy and Management Act of 1976 [hereinafter “FLPMA”], Pub. L. 94-579, 90 Stat. 2743 (1976).

the House version of the legislation.<sup>18</sup> Skepticism in the House towards executive withdrawal authority dated back to the 1970 report of the Public Lands Law Review Commission (PLLRC), a Congressionally-created special committee tasked with recommending a complete overhaul of the public land laws. The PLLRC report called on Congress to repeal all existing withdrawal powers, including the power to create national monuments under the Antiquities Act.<sup>19</sup> The Commission suggested replacing this authority with a comprehensive withdrawal process run by the Secretary of the Interior and closely supervised by Congress.<sup>20</sup>

The House Committee on Interior and Insular Affairs' Subcommittee on Public Lands largely followed this recommendation in including Section 204 in its draft of FLPMA. Complementing this section, the bill presented to and passed by the House included a provision – ultimately enacted as Section 704(a) of FLPMA – that repealed the Pickett Act and other extant laws allowing executive withdrawals, as well as the implied executive authority to withdraw public lands that the Supreme Court recognized in *United States v. Midwest Oil Co.*<sup>21</sup>

Consistent with this approach, the Subcommittee on Public Lands drafted Section 204(j) in order to constrain Executive Branch discretion in the context of national monuments. The Subcommittee frequently discussed the issue during its detailed markup sessions in 1975 and early 1976 on its version of the bill that would eventually become FLPMA.<sup>22</sup>

<sup>18</sup> The Senate bill, S. 507 (94th Cong.), contained no restrictions on executive withdrawal power.

<sup>19</sup> See PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 7, at 2, 54-57.

<sup>20</sup> *Id.*

<sup>21</sup> 236 U.S. 459 (1915).

<sup>22</sup> The subcommittee's hearings and markups focused on H.R. 5224, which eventually passed the full Committee in May 1976. The amended version was reintroduced as a clean bill, H.R. 13777, which was approved by the House and set to the conference committee.

At an early markup session in May 1975, some subcommittee members, under the mistaken impression that the Secretary of the Interior created national monuments, expressed concerns that some future Secretary might modify or revoke them.<sup>23</sup> The Subcommittee therefore began shaping the bill to eliminate any possibility of unilateral executive power to modify or revoke monuments, while maintaining the existing power to create monuments.<sup>24</sup>

Once the Subcommittee's misunderstanding about Secretarial authority to designate monuments was corrected, the Subcommittee also proposed shifting the authority to create national monuments from the President to the Secretary, in the pattern of consolidating withdrawal authority in Section 204.<sup>25</sup> It was after this discussion that the first version of what later became Section 204(j) of FLPMA was drafted, paired with a provision that would have amended the

<sup>23</sup> See Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224, et al., Public Land Policy and Management Act of 1975, at 88-93 (May 6, 1975). Later statements by subcommittee members indicate that their understanding was that the Secretary had delegated authority to propose the creation of monuments, but that they were ultimately proclaimed by the President. Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224 & H.R. 5622, at 184 (June 6, 1975).

<sup>24</sup> See Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224, et al., Public Land Policy and Management Act of 1975, at 91 (May 6, 1975) (statement of Rep. Melcher) ("I would say that it would be better for us if, in presenting this bill to the House, for that matter in full committee, if we made it clear that the Secretary and perhaps also make it part of the bill somewhere, that he can not revoke a national monument."); *id.* at 93 (statement of Rep. Senzel) ("So we could put in here that—we can put in the statement that he cannot revoke national monuments once created."); see also Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224 & H.R. 5622, at 176 (June 6, 1975) (statement of Rep. Senzel) ("In accordance with the decision made the last time, there is a section added in there that provides that no modification or revocation of national monuments can be made except by act of Congress.")

<sup>25</sup> *Id.* at 183-85.



Antiquities Act to transfer designation authority from the President to the Secretary of the Interior.<sup>26</sup> The Ford Administration objected generally to taking away the president's power to withdraw public lands.<sup>27</sup> As part of the subsequent changes to the draft legislation, the Subcommittee dropped the provision that would have transferred monument designation authority from the President to the Secretary.<sup>28</sup>

Section 204(j), however, was retained. Pairing Section 204(j) with the proposed transfer of monument designation power strongly suggests that the language of Section 204(j) was not an effort to constrain (non-existent) Secretarial authority to modify or revoke national monuments, while retaining Presidential authority to do so. Instead, it was part of an overall plan to constrain and systematize all Executive Branch withdrawal power, and reserve to Congress the powers to modify or rescind monument designations. The House Committee's Report on the bill makes clear that this provision was designed to prevent *any* unilateral executive modification or revocation of national monuments. In describing Section 204 of the bill as it was presented for debate on the House floor, the Report explains:

With certain exceptions, [the bill] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the

Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and National Seashores. *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System.* These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.<sup>29</sup>

Thus, notwithstanding the anomalous reference to the Secretary in Section 204(j), Congress explicitly stated its intention to reserve for itself the authority to modify or revoke national monuments. The plain language of this report, combined with other statements in the legislative history and the process by which Section 204(j) was created, makes clear that Congress' intent was to constrain all Executive Branch power to modify or revoke national monuments, not just Secretarial authority.

In light of the text of the Antiquities Act, the contrasting language in other statutes at the turn of the 20th century, and the changes to federal land management law in FLPMA, the Antiquities Act must be construed to limit the President's authority to proclaiming national monuments on federal lands. Only Congress can modify or revoke such proclamations.

<sup>26</sup> See Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Markup Public Land Policy and Management Act of 1975 Print No. 2, § 204(a), at 23-24 (Sept. 8, 1975) (prohibiting the Secretary from modifying or revoking a national monument); *id.* § 604(c), at 92 (amending the Antiquities Act by substituting "Secretary for the Interior" for "President of the United States").

<sup>27</sup> See H.R. REP. 94-1163, at 52 (May 15, 1976) (comments from Secretary of Interior on Subcommittee Print No. 2 stating that under it, "the proposed . . . Act would be the only basis for withdrawal authority").

<sup>28</sup> See Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Public Land Policy and Management Act of 1975 Print No. 4 (March 16, 1976).

<sup>29</sup> H.R. REP. 94-1163, at 9 (emphasis added). Floor debates in the House do not contain any record of discussing this particular issue, and the Conference Report on FLPMA, later in 1976, did not specifically address it.

## Authority for Shrinking National Monuments or Removing Restrictive Terms

If the President cannot eliminate a national monument, it follows that the President cannot accomplish that prohibited objective by downsizing or loosening the protections afforded to a monument. Moreover, the use of the phrase “modify and revoke” to describe prohibited actions under

FLPMA makes clear that the same legal principles that prevent future executives from revoking monument status apply to prevent modifications of prior proclamations.

The analysis above thus applies with equal force to limit the President’s authority to remove land from a previously-designated national monument or to remove restrictions originally imposed on allowable activities within a monument’s boundaries. While the Antiquities Act limits national monuments to “the smallest area compatible with the proper care and management of the objects to be protected,”<sup>30</sup> that language does not grant the

President the authority to revisit previous presidential decisions about what area or level of protection is needed as a justification for shrinking a monument or changing its restrictive terms.

### Presidents lack legal authority to shrink national monuments

In the first few decades of the law’s existence, various Presidents, on occasion, reduced the size of monuments designated by predecessors. But the President’s authority to remove land from monuments has never been tested in court, and so no court has ever weighed in on the legal arguments raised here. Moreover, all such actions occurred prior to 1976; since FLPMA became law in

<sup>30</sup> 54 U.S.C. § 320301(b).

that year, no President has attempted to downsize a national monument or remove previously adopted restrictions. As the language and legislative history of FLPMA make clear, Congress has quite specifically reserved to itself “the authority to *modify* and revoke withdrawals for national monuments created under the Antiquities Act.”<sup>31</sup>

In his 1938 opinion, Attorney General Cummings acknowledged the history of modifications to national monuments, noting that “the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom[.]”<sup>32</sup> The opinion, however, does not directly address whether these actions were legal, and does not analyze this issue.

The Interior Department’s Solicitor did review several presidential attempts to shrink monuments, but reached inconsistent conclusions. In 1915, the Solicitor examined President Woodrow Wilson’s proposal to shrink the Mt. Olympus National Monument, which President Theodore Roosevelt had designated in 1909.<sup>33</sup> Without addressing the core legal issue of whether the President had authority to change the monument status of lands designated by a prior President, the Solicitor expressed the opinion that lands removed from the monument would revert to national forest (rather than unreserved public domain) because they had previously been national forest lands.<sup>34</sup>

In the end, President Wilson did downsize the Mt. Olympus National Monument by more than 313,000 acres, nearly cutting it in half.<sup>35</sup> Despite an outcry from the conservation community, Wilson’s decision was not

<sup>31</sup> H.R. REP. 94-1163, at 9 (emphasis added); 43 U.S.C. 1714(j) (“The Secretary shall not . . . *modify* or revoke any withdrawal creating national monuments under [the Antiquities Act] . . .”) (emphasis added).

<sup>32</sup> 39 Op. Att’y Gen. 185, 188 (1938).

<sup>33</sup> Proclamation No. 869, 35 Stat. 2247 (1909); see also Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 562-63 (2003).

<sup>34</sup> Solicitor’s Opinion of April 20, 1915, at 5-6 (on file with authors).

<sup>35</sup> Proclamation No. 1293, 39 Stat. 1726 (1915).

challenged in court and so was allowed to stand.<sup>36</sup>

In 1924, for the first time, the Solicitor squarely confronted the issue of whether a President has the authority to reduce the size of a national monument, concluding that the President lacked this authority. The Solicitor considered whether the President could reduce the size of the Gran Quivira<sup>37</sup> and Chaco Canyon National Monuments.<sup>38</sup> Relying on a 1921 Attorney General's opinion involving military withdrawals, the Solicitor concluded that the President was not authorized to restore lands to the public domain that had been previously set aside as part of a national monument.<sup>39</sup> The Solicitor confirmed this position in a subsequent decision issued in 1932.<sup>40</sup>

Subsequently, in 1935, the Interior Solicitor reversed the agency's position, but this time on somewhat narrow grounds.<sup>41</sup> This opinion relied heavily on the implied authority of the President to make and modify withdrawals that had been upheld by the U.S. Supreme Court in *United States v. Midwest Oil Co.*<sup>42</sup> As noted previously, however, Congress expressly overturned *Midwest Oil* in FLPMA in 1976.<sup>43</sup> Thus, even if those earlier monument modifications could

arguably have been supported by implied presidential authority to make withdrawals and reservations, after FLPMA, it is no longer available to justify the shrinking of national monuments.

Critics of recent national monument designations have argued that a President could downsize a national monument by asserting portions of it do not represent the "smallest area compatible" with the protection of the resources and sites identified in the monument proclamation.<sup>44</sup> Courts have consistently upheld the use of the Antiquities Act to protect large landscapes as "objects of historic or scientific interest," from the Grand Canyon,<sup>45</sup> designated less than two years after the Act's passage, to the Giant Sequoia National Monument, created in 2000.<sup>46</sup>

In appropriate circumstances, a court might consider a claim that a monument proclamation violates the "smallest area compatible" provision of the statute, albeit under a standard of review highly deferential to the designating President's findings.<sup>47</sup> However, the clear restriction on modifying or revoking a national monument

<sup>44</sup> See, e.g., John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations* 14-18 (American Enterprise Institute 2017). The Interior Solicitor's 1935 opinion, and a subsequent one in 1947, addressed this issue in reviewing and supporting the validity of the decision by Woodrow Wilson to shrink the Mt. Olympus National Monument. According to that opinion, both the Interior and Agriculture Departments thought the area was "larger than necessary." However, there is no legal basis for determining that the opinions of cabinet officials should overturn a prior presidential determination as to the management requirements of a protected monument. See Squillace, *supra* note 33, at 561-62; *National Monuments*, 60 *Interior Dec.* 9 (July 21, 1947).

<sup>45</sup> *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).

<sup>46</sup> *Tulare County v. Bush*, 306 F.3d 1138, 1140-41 (D.C. Cir. 2002). Additional Supreme Court cases that address Antiquities Act designations support this broad interpretation of what may constitute an "object of historic or scientific interest." See *United States v. California*, 436 U.S. 32, 34 (1978); *Cappaert v. United States*, 426 U.S. 128, 131-32 (1976).

<sup>47</sup> See *Tulare County*, 306 F.3d at 1142; *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

<sup>36</sup> See Squillace, *supra* note 33, at 563-64.

<sup>37</sup> Proclamation No. 959, 36 Stat. 2503 (1909).

<sup>38</sup> Proclamation No. 740, 35 Stat. 2119 (1907).

<sup>39</sup> Solicitor's Opinion of June 3, 1924, M-12501. In language that anticipated the later 1938 opinion, this 1921 Attorney General's opinion concluded that "[t]he power to thus reserve public lands and appropriate them . . . does not necessarily include the power to either restore them to the general public domain or transfer them to another department." 32 Op. Att'y Gen. 488, 488-491 (1921). The Solicitor's 1924 opinion might be distinguished from the 1915 opinion on the grounds that the earlier opinion had specifically supported the modification of the monument because the lands would not be restored to the public domain, but would rather be reclassified as national forests. The legal argument against the modification of monument proclamations, however, has never rested on whether the lands would be restored to the public domain or revert to another reservation or designation.

<sup>40</sup> Solicitor's Opinion of May 16, 1932, M-27025.

<sup>41</sup> Solicitor's Opinion of January 30, 1935, M-27657.

<sup>42</sup> 236 U.S. 459 (1915).

<sup>43</sup> FLPMA, § 704(a), 90 Stat. 2792 (1976).

designation—cemented by FLPMA—indicates that a President cannot simply revisit a predecessor's decision about how much area is required.

### Removing protections that apply on national monuments would be an unlawful modification

A related issue is whether a President can modify a national monument proclamation by removing some or all of the protections applied to the monument area, such as limitations on livestock grazing, mineral leasing, or mining claims location. Plainly, these are types of “modifications.” As discussed above, Congress’s use of the phrase “modify and revoke” to describe prohibited actions demonstrates that the same legal principles apply here as would apply to an attempt to abolish a monument. More generally, if a President lacks the authority to abolish or downsize a monument, it would also suggest a lack of presidential authority to remove any restrictions imposed by a predecessor. Moreover, to the extent that presidential authority is premised on an argument that the President can shrink a monument to conform to the “smallest area compatible” language of the Antiquities Act, that argument would be inapplicable to an effort to remove restrictive language from a predecessor’s national monument proclamation.<sup>48</sup>

Aside from these legal arguments, construing the Antiquities Act as providing one-way Presidential designation authority is consistent with the fundamental goal of the statute. Faced with a concern that historical, archaeological, and natural or scenic resources could be damaged or lost, Congress purposefully devised a delegation to the President to act quickly to ensure that objects of historic and scientific interest on public lands can be preserved before they are looted

or compromised by incompatible land uses, such as the location of mining claims. Once the President has determined that these objects are worthy of protection, no future President should be able to undermine that choice. That is a decision that Congress has lawfully reserved for itself under the terms of the Antiquities Act, as reinforced by the text of FLPMA.

### Conclusion

Our conclusion, based on analysis of the text, other statutes, and legal opinions, is that the President lacks the authority to rescind, downsize, or otherwise weaken the protections afforded by a national monument proclamation declared by a predecessor. Moreover, while we believe this to be the correct reading of the law from the time that the Antiquities Act was adopted in 1906, the enactment of FLPMA in 1976 removes any doubt as to whether Congress intended to reserve for itself the power to revoke or modify national monument proclamations. Congress stated so explicitly.

Presidents may retain some authority to clarify a proclamation that contains an ambiguous legal description or a mistake of fact.<sup>49</sup> Where expert opinions differ, however,

<sup>49</sup> The Navajo National Monument offers a good example. The original proclamation issued by President Taft protected “all prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric people, situated on the Navajo Indian Reservation, Arizona between the parallels of latitude 36°30' North, and 37° North, and between longitude 110 ° West and 110 ° 45' West . . . together with forty acres of land upon which each ruin is located, in square form, the side lines running north and south and east and west, equidistance from the centers of said ruins.” Proclamation No. 873, 36 Stat. 2491 (1909). The map accompanying the proclamation stated that it is “[e]mbracing all cliff dwelling and pueblo ruins” [between those lines] . . . with 40 acres of land in square form around each of said ruins.” The original proclamation was apparently intended to include only 40 acres around the ruins in that large area but the map that accompanied the proclamation was ambiguous at best. The revised proclamation, which was signed three years later by the same President Taft, references a survey done after the original

<sup>48</sup> For further discussion of this issue, see Squillace, *supra* note 33, at 566-68.

courts should defer to the choices made by the President proclaiming the monument and the relevant objects designated for protection. Otherwise, a future President could undermine the one-way conservation authority afforded the President under the Antiquities Act and the congressional decision to reserve for itself the authority to abolish or modify national monuments.

The remarkable success of the Antiquities Act in preserving many of our nation's most iconic places is perhaps best captured by the fact that Congress has never repealed any significant monument designation.<sup>50</sup> Instead, in many instances, Congress has expanded national monuments and redesignated them as national parks. For more than 100 years, Presidents from Teddy Roosevelt to Barack Obama have used the Antiquities Act to protect our historical, scientific, and cultural heritage, often at the very moment when these resources were at risk of being exploited. That is the enduring legacy of this extraordinary law. And it remains our best hope for preserving our public land resources well into the future.

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proclamation and specifically identified two 160-acre tracts of land and one 40-acre tract for protection. Proclamation No. 1186, 37 Stat. 1738 (1912).

<sup>50</sup> About a dozen monuments have been abolished by the Congress. None of these were larger than 10,000 acres, and no monument has been abolished without redesignating the land as part of another national monument or other protected area since 1956. See Squillace, *supra* note 33, Appendix.

*This paper may be cited freely with proper attribution prior to official publication. The authors request that, where possible, citations refer to the paper's availability at <https://ssrn.com/abstract=2967807> and to its future publication in 103 Va. L. Rev. Online \_\_\_\_ (2017).*

Acknowledgments:

The authors express thanks to Emma Hamilton for research assistance.

Cover Photo: Kolob Canyon, Zion National Park, Utah  
(Nicholas Bryner)

Mr. BERNHARDT. At the end of the day, that's not been tested. And here's my view of where that ultimately comes out.

The first question, and this is the biggest question, is this isn't a decision that's made by the Department of the Interior. It's not even made by the Department of Justice. It's a decision that will be made at the White House because you're talking about the exercise of Presidential power.

And——

Senator KING. Presidential power, as all Presidential powers, are somewhat circumscribed by statute and in the Constitution.

Mr. BERNHARDT. Well, absolutely, but this is specific authority given to the President.

So, I can at least tell you that when these discussions take place, they will take place in the White House Counsel's office with a view from the Department of Justice, potentially a view from the Office of Interior's Solicitor and many other views. And I cannot predict at this moment in time where that—where the White House Counsel will end up.

Obviously people are familiar with the 1938 opinion. They're also familiar with other legal arguments and some folks have even criticized the '38 opinion.

So I don't know where the government will come out, but I know that it won't be a decision made at Interior.

Senator KING. Thank you.

You have been criticized, and I am sure you are aware of it, for having been in the Department, in the private sector, represented groups and organizations, now you are going back into the Department. One way to characterize that is you have broad experience with these issues. Another way to characterize it is potential conflicts of interest. Talk to me about that issue.

Mr. BERNHARDT. Well, first off I'd say, on a personal level, I take ethics incredibly seriously.

Senator Cantwell raised a statement made in 2005 by Earl Devaney in a hearing. If she scrolls through that hearing a little farther she's going to see another statement by Earl Devaney where he says I've been talking to the Acting Solicitor and I think he gets it, meaning he gets——

Senator KING. That was you.

Mr. BERNHARDT. I was the Acting Solicitor. And what he meant is I think he gets that Bernhardt understands that these decisions made, legal decisions, legal advice that needs to be given, that legal advice needs to be given in a way that says it's in the interest of the public and the interest of the American public and that's the way I conducted myself.

I looked at——

Senator KING. Is it your commitment here today to make all your decisions in the interest of the people of the United States of America?

Mr. BERNHARDT. Unequivocally, and I have signed the exact same agreements my predecessors have. And I will stand by that.

Senator KING. Thank you.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator King.

Senator Gardner.

Senator GARDNER. Thank you, Madam Chair, and again, thanks to you and Ranking Member Cantwell for this hearing today. Again, welcome to the Bernhardt Family.

I have a couple of letters of support for Mr. Bernhardt that I would ask unanimous consent to be submitted into the record, a letter from the——

The CHAIRMAN. It will be submitted.

Senator GARDNER. Thank you.

[The information referred to follows:]



## SOUTHERN UTE INDIAN TRIBE

May 17, 2017

U.S. Senator Cory Gardner  
354 Russell Building  
Washington, D.C. 20510

Re: Support for David Bernhardt to be Deputy Secretary for the Department of Interior

Dear Senator Gardner,

On behalf of the Southern Ute Indian Tribe, I am writing to express our support for David Bernhardt's nomination to serve as Deputy Secretary for the Department of Interior. Our Tribe advocates for policies that promote Indian energy development, tribal sovereignty, Indian self-determination, and a positive government-to-government relationship between Indian tribes and the United States. As you know, Indian country faces many challenges, including reconsolidating fractionated lands, tribal economic development, and providing quality programs and services to tribal members.

After decades of disciplined governance and energy resource development, our Tribe has built an economy that is balanced, mature, and diversified. It is no exaggeration to say that our economy is the engine of growth and household incomes in southwest Colorado. As a result, our Tribe has long been involved in helping the Congress and federal agencies shape a rational, pro-development energy policy.

As a native of Colorado, Mr. Bernhardt is aware of our Tribe's unique history, particularly the role that meaningful self-determination coupled with prudent energy development has played in achieving economic prosperity for our Tribe, our tribal members, and surrounding communities. Given Mr. Bernhardt's familiarity with our Tribe's story and his stellar qualifications, we believe that Mr. Bernhardt is well-positioned to help lead the Department of the Interior in a manner that respects the federal trust responsibility to Indian tribes and empowers tribal communities to exercise greater self-determination. We urge swift approval of Mr. Bernhardt's nomination by the Senate Committee on Energy and Natural Resources.

Thank you for your leadership on this important matter.

Sincerely,

A handwritten signature in cursive script, reading "Clement J. Frost".

Clement J. Frost  
Chairman





May 23, 2017

The Honorable Cory Gardner  
**Questions for the Record Submitted to Mr. David Bernhardt  
from Senator Angus King**

**Question:** Do you believe that prior record of service and performance should be a factor when considering how the National Park Service awards concession contracts?

United States Senate  
Washington, D.C. 20510  
(via email)

Dear Senator Gardner:

On behalf of the Colorado River Water Conservation District, I write to endorse and urge your support for confirmation of David Bernhardt as Deputy Secretary for the Department of the Interior.

The Colorado River District has enjoyed working with David in a variety of capacities in the past. We have worked with David Bernhardt on both legislative and regulatory issues. He has always been advocate for western water and a problem-solver.

Mr. Bernhardt is highly qualified for this position. He spent his youth in Rifle, Colorado and learned water policy and water law from such exemplary mentors as Russell George and Scott McInnis. More recently, his service as the Solicitor for the Department of the Interior and his other D.C. experience will serve him and Interior extremely well in this new position. As a longtime advocate for western water, coupled with his understanding of both the legislative and regulatory process make him highly qualified to serve in this position.

The Department and the nation would be well served to have someone with David's qualifications and personal integrity in this position. The Colorado River District encourages your support and that of the US Senate for the prompt confirmation of David Bernhardt as Deputy Secretary, Department of the Interior.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Eric Kuhn".

R. Eric Kuhn, General Manager

201 Centennial Street / PO Box 1120 • Glenwood Springs, CO 81602  
(970) 945-8522 • (970) 945-8799 Fax  
[www.ColoradoRiverDistrict.org](http://www.ColoradoRiverDistrict.org)



# Colorado Water Congress

EST 1958

THE LEADING VOICE OF COLORADO'S WATER COMMUNITY

May 15, 2017

The Honorable Cory Gardner  
United States Senate  
Washington, D.C. 20510

Dear Senator Gardner,

On behalf of the Colorado Water Congress, we are writing to express our support for David Bernhardt to serve as Deputy Secretary for the Department of the Interior.

The Colorado Water Congress is the principal voice of Colorado's water community, and our Federal Affairs Committee fully supports Mr. Bernhardt's nomination. We have worked with David on issues affecting our water supplies; storage; delivery and conservation, as well as some regulatory issues, while he worked on Capitol Hill and the Department of the Interior.

Mr. Bernhardt is highly qualified to serve in this position. From his roots in Western Colorado to his prior service as the Solicitor for the Department of the Interior and in many other capacities, David has been a strong advocate for western water. Further, his thorough understanding of both the legislative process and natural resources law make him highly qualified to serve in this position.

David has been a public servant committed to the meaning of the term. He believes in and practices straight talk; is inclusive in consideration of issues brought before; explores all available options on the path to finding workable solutions in the real world where government actions impact real people. He has earned the trust of many because of his ability to communicate effectively and decide fairly.

The Department would be well served to have someone with David's qualifications and personal integrity in this position. Colorado Water Congress encourages the United States Senate to promptly confirm David Bernhardt's nomination so that the important work of the Department of the Interior can move forward.

Sincerely,

Doug Kemper  
Executive Director

Andy Colosimo  
Federal Affairs Committee Chair

Chris Treese  
Federal Affairs Committee Vice Chair

Senator GARDNER. A letter from the Southern Ute Indian Tribe in Southwestern Colorado supporting the nomination, a letter from the Colorado River District supporting David Bernhardt's nomination and a letter from the Colorado Water Congress supporting Mr. Bernhardt's nomination.

I think it is important to point out, an organization like the Colorado Water Congress which has environmentalist members, it has engineering members, it has lawyer/attorney members. This comment from Colorado Water Congress' letter of support for the nomination says, "Mr. Bernhardt believes in and practices straight talk, is inclusive in consideration of issues brought before, explores all available options on the path to finding workable solutions in the real world where government actions impact real people."

I think that speaks very highly of your work, but also from the people who have known your work in the past, not just as a member of the Interior Department but as a Coloradan, having worked in Colorado Congressional Offices and beyond, the importance of finding those solutions that impact a lot of people.

Mr. Bernhardt, you and I have had a number of conversations about how we can help better promote our public lands, how we can better manage our public lands, what we can do to make sure that we continue to protect and highlight our public lands.

There is a bipartisan support growing for moving an agency like the Bureau of Land Management (BLM) to the West, where 99 percent of the land the BLM holds is West of the Mississippi River. We have talked about placing it in Grand Junction which is, of course, the Western Slope in Mesa County, right next door to Rifle, Colorado. That is where the Colorado National Monument is home to, so it would be right there in Mesa County. Seventy-four percent of the acreage is federal land managed primarily by the BLM.

Do you think we ought to explore whether putting the federal workforce that specializes in these public land initiatives closer to lands and the people they affect? Do you think that is a good idea?

Mr. BERNHARDT. Well, not only do I think it's a good idea, Senator, I think it might already be happening.

[Laughter.]

Senator GARDNER. I appreciate that, Mr. Bernhardt. I have introduced legislation that to do just that.

In a number of other conversations that you and I will be having over the years, if you are confirmed, of course, is water issues. I learned from, I think, Speaker George that "damn bureau" was one word to a lot of people in the Western Slope of Colorado.

[Laughter.]

But they have gone on to do some very great things and we have to make sure that those great things can continue.

We have numerous proposed water projects in Colorado, including projects like the Northern Integrated Supply Project, others in the Western Slope as well, things like the Arkansas Valley Conduit, the Arkansas Valley Conduit was authorized to be built, a pipeline, from Pueblo, Colorado to Lamar, Colorado, a 200-mile journey, to provide clean water to economically, low, depressed, economically depressed areas, affordable, abundant, clean water. That was authorized, as you know, by President John F. Kennedy, and yet it still has not been built.

Will you commit to working with me and the Colorado delegation to improve our federal regulatory permitting process, members of this Committee, as well, in order to assist in getting the critical water projects approved in a more timely fashion?

Mr. BERNHARDT. Absolutely.

I think this is one of the most significant things that, maybe, I can help the Committee understand is many of these projects are not seeking federal money, but what they need is some regulatory certainty in terms of getting them developed. And ideas like Senator Gardner's could fundamentally help develop these projects in a reasonable way. And I look forward to working with you on that because I believe that the era of financing these projects in many instances, not all, is gone. But the regulatory certainty needs to be there or the projects are just not going to get built.

And you know, many of the projects we use to today were built in the 60's. And you look back and you say wow, you know, that's really not that long. And we need to be thinking about the next 100 years, as Mr. Franken said, at least for water.

Senator GARDNER. And as you have, many times, gone into the Great Rotunda at the capital in Denver, you will see that mural written on the wall that says, "Here is a land where history is written in water."

Mr. BERNHARDT. That's right.

Senator GARDNER. Will you commit to continuing the tradition of allowing states to take the lead in negotiating interstate water compacts?

Mr. BERNHARDT. Absolutely.

Senator GARDNER. Thank you.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Gardner.

The last person in this first round is Senator Duckworth.

Senator DUCKWORTH. Thank you so much, Madam Chair.

I would like to submit the following articles for the record. There's several so I'm just going to describe them all first.

The first one is an article that ran in Mother Jones in 2003. It documents that the nominee was the Bush Administration's point person, pushing oil drilling in the Arctic to Wyoming and that the nominee altered the scientific findings from the Fish and Wildlife Service so that they would fit his political and policy priorities. These findings came from a report funded by BP exploration and were shared in congressional testimony.

The second item is an article that ran in the Washington Post in 2007. It details that senior political appointees in the Bush Administration resigned over ethical violations while the nominee was the Solicitor of DOI. Those appointees revised scientific reports in an effort to minimize the protections of endangered species. And as you know, the Office of Solicitor performs the legal work for DOI which includes overseeing the Ethics Office.

The third item is an article that was published in the Wall Street Journal in 2008. It details how when the nominee was at DOI the Minerals Management Service allowed oil companies to avoid paying royalties for offshore drilling rights which will cost taxpayers as much as \$10.5 billion over about 25 years.

The fourth item is an investigative report that was written by the Interior's Inspector General. This report details how employees at the Minerals Management Service created a culture of ethical failure by consuming alcohol at industry functions, had used cocaine and marijuana and had sexual relations with oil and gas company representatives. These events occurred on the nominees watch as Solicitor and other leadership roles at Interior. The article further observes that employees had escaped punishment by leaving the Department.

The fifth item is a press release from DOI which was published in 2012. It indicates that Shell Oil had \$25 million in underpaid royalties for federal offshore oil and gas drilling leases in the Gulf of Mexico during the nominees' time at the agency. That money should have gone to states like Louisiana and was settled under the Obama Administration.

The sixth item is an article that ran this week in the LA Times. It states that as a partner at one of the nation's top grossing lobbying firms, the nominee represented major players in oil, mining and western water. These are all areas that fall under the purview of DOI that the nominee would regulate, if confirmed as the Department's Deputy Secretary.

Finally, I would like to submit the nominee's client list while at Brownstein, Hyatt, Farber and Schreck. This list includes the who's who of oil companies that the nominee would regulate as Deputy Secretary.

Those are the seven items.

The CHAIRMAN. The items that you have requested be included as part of the record will be included, although I would probably disagree with many of the summations that you have made there. So I will look forward to reading them.

Senator DUCKWORTH. Yes, of course.

[The information referred to follows:]

# Mother Jones

## The Ungreening of America: Behind the Curtain

*George W. Bush's stealth assault on environmental rules is being carried out by a cadre of appointed bureaucrats with strong ties to the very industries they are now supposed to regulate.*

By | Mon Sep. 1, 2003 3:00 AM EDT

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It's no secret that in Washington, the most important decisions are made by bureaucrats, and George W. Bush has learned that lesson well. More than any president in recent history, he has filled key behind-the-scenes jobs with lawyers and lobbyists plucked from the industries they now regulate -- people who have spent their careers seeking to dismantle or circumvent environmental rules and who, in their new jobs, are continuing to do just that. A sample:

MARK REY

Undersecretary for Natural Resources and Environment, Department of Agriculture

Then: One of the nation's foremost timber lobbyists, Rey spent twenty years working for timber industry organizations such as the National Forest Products Association, the American Paper Institute, and the American Forest Resources Alliance. He also served as a Vice President of the American Forest and Paper Association, a leading advocate of logging in national forests.'

In 1995, as a staff member to the Senate Energy and Natural Resources committee, Rey authored the "salvage" timber rider, which suspended environmental laws

guarding old growth forests in the Pacific Northwest. Rey also authored Senator Larry Craig's (R-ID) version of the National Forest Management Act, lifting the language of the bill directly from the American Forest and Paper Association's recommendations to the House resource committee. The bill eliminated citizen oversight committees and other environmental safeguards.

Rey has long been associated with anti-regulatory, 'wise use' advocates, including the Alliance for America. He was a featured speaker, as a representative of the Senate Energy Committee, at the Alliance's 1996 and 1998 "Fly In for Freedom" events.

Now: As the administration's top forestry official, Rey has been a key force behind two administration measures benefiting timber companies -- the "Healthy Forests" initiative to accelerate logging in wildfire-prone areas, and the decision to grant exemptions to the ban on logging in roadless areas of national forests. Both would allow loggers to cut bigger trees in areas such as the Tongass National Forest and the Giant Sequoia National Monument. "Put simply," Rey has said, "We should start with the premise that a policy cannot be good for the environment if it is bad for people."

JAMES L. CONNAUGHTON

Chairman, Council on Environmental Quality

Then: Connaughton lobbied on behalf of power companies and major electricity users; he also represented companies fighting Superfund cleanup rules. He co-authored a 1993 law journal article, "Defending Charges of Environmental Crime -- The Growth Industry of the '90s."

Now: As the president's senior environmental adviser, Connaughton has helped develop the White House's positions on climate change (ignore), Superfund (shrink), and air-quality rules (relax).

ALLAN FITZSIMMONS

Wildlands Fuels Coordinator, Department of the Interior

Then: Fitzsimmons has built a career around questioning the scientific basis of ecosystems. While an aide to the Assistant Secretary for Fish and Wildlife and Parks in 1986, Fitzsimmons wrote a memo suggesting that "public recreational benefit is the principal reason for conserving natural features."

After leaving the public sector in 1992, Fitzsimmons formed a consulting firm, Balanced Resource Solutions, and began writing extensively for conservative think-tanks and free-market groups. In one 1999 paper, published by the Political Economy Research Center, Fitzsimmons declared that "The main problem is that ecosystems are not real... Ecosystems are only mental constructs, not real, discrete, or living things on the landscape. The second problem is that even if they were real, we have no idea of what their 'health' or 'integrity' might mean."

Now: Fitzsimmons is the administration's wildfire czar, in charge of implementing the president's 'Healthy Forests Initiative.' That program is predicated on the belief that "deteriorated forest and rangeland conditions significantly affect...ecosystem health."

DALE BOSWORTH  
Chief, US Forest Service

Then: Bosworth is a career forester, having served with the Forest Service for more than three decades. At the time of his appointment in May, 2001, Bosworth was praised by outgoing Forest Service boss Mike Dombeck, who noted that Bosworth "led development of the roads rule," the foundation of the sweeping Clinton-era protections to prohibit road building in portions of national forests that are still wild.

Now: When he was appointed, Bosworth affirmed his support for the Clinton-era roadless rule. Since then, however, he has emerged as one of the point men in the administration's campaign to gut the regulation and to allow more logging in national forests -- with less public input. In 2001, shortly after being appointed, Bosworth told



a House subcommittee that he would like to see forest management guidelines streamlined to expedite timber sales while restricting public involvement.

In October of 2001, Bosworth again lifted restrictions on industry use of public lands, asking Interior Secretary Gale Norton to lift a 2-year moratorium on new mining activities affecting 1.15 million acres of federal land in Southern Oregon.

Bosworth's claim to support roadless protections will soon be put to the test. Following the Bush administration's decision to settle a lawsuit brought by the state of Alaska, the Forest Service is prepared to exempt the 17-million-acre Tongass National Forest from restrictions on road-building. The move would open nearly 10 million acres of the forest to logging -- in large part because, under Bosworth's watch, the Forest Service has refused to designate any more of the Tongass as wilderness.

#### REBECCA WATSON

Assistant Secretary for Land and Minerals Management, Department of the Interior

Then: As a lawyer in Montana, Watson represented mining interests including Fidelity Exploration and Production Co, a coalbed methane drilling company active in the Powder River Basin.

Now: While Watson has recused herself from making decisions related to coalbed methane extraction, she has testified before Congress advocating increased drilling across the west. According to published reports, Watson has also lobbied Montana Gov. Judy Martz against establishing strict standards for waste water generated by coalbed methane production.

In one of her first actions in office, Watson signed off on an internal rule change reversing a Clinton administration's decision to kill Glamis Corp.'s proposed gold mine on a Native American sacred site in California. Watson once worked for the law firm Crowell & Moring, whose clients include Glamis.

## KATHLEEN CLARKE

Director, Bureau of Land Management

Then: Clarke is yet another western land manager with close ties to Republican lawmakers. For three years before being tapped to run the BLM, Clarke served as director of Utah's Department of Natural Resources, where she quickly became a favorite of the state's mining and drilling industry. Clarke was appointed to that office by Gov. Mike Leavitt, in whose office she had served as an aide. Clarke had also served for six years on the staff of Rep. Jim Hansen (R-Utah).

Now: When she was named to head the BLM, Clarke promised to recuse herself from "any official matters [that] involve BLM and the state of Utah." But, according to the Interior Department's own Office of the Inspector General, Clarke may have violated this promise by weighing in on a controversial proposal in which the BLM undervalued 135,000 acres of public land it was trying to swap with the state of Utah by \$116 million. Critics contend that the swap -- promoted by both Leavitt and Hansen -- was designed to benefit business interests.

In a speech to the Society for Range Management in February 2003, Clarke mused, "Some of you may remember fondly the days when BLM was called the, or referred to, as the Bureau of Livestock and Mining, and based on what's happened in the last decade, some people thinks it's much closer to the Bureau of Landscapes and Monuments. But I'm here today to tell you we're still interested in multiple use and my motivation for coming to this Agency was to secure that mission."

## DAVID BERNHARDT

Director of Congressional and Legislative Affairs, Department of the Interior

Then: As an attorney with Brownstein, Hyatt, and Farber, Bernhardt lobbied Congress and federal administrative agencies on behalf of Delta Petroleum Corp., Timet-Titanium Metals Corp., NL Industries (an international chemical company), and the

Shaw Group (a maker of piping for oil companies and power plants). Bernhardt also worked for 6 years on the staff of Rep. Scott McInnis (R-Colo), serving as point person for a federal water rights settlement with Colorado's Ute Indian tribe. Critics of the settlement claim that its true purpose was not to appease native groups, but to benefit developers.

Now: Bernhardt has been one of the administration's point people in the push to promote oil drilling from the Arctic to Wyoming; in 2001, he helped prepare congressional testimony on Arctic drilling for Interior Secretary Gale Norton that dismissed warnings from the government's own scientists. The Fish and Wildlife Service, the agency that runs the wildlife refuge, had reported that drilling could have a negative impact on the region's caribou herds. According to published reports, Bernhardt rewrote the FWS findings, and Norton, in answering questions before a Senate panel, misrepresented the research, relying instead on information from a report funded by BP Exploration.

#### JEFFREY HOLMSTEAD

Assistant Administrator, Air and Radiation, Environmental Protection Agency

Then: From 1993 until his appointment to the EPA, Holmstead worked at the Washington law firm Latham & Watkins, representing the American Farm Bureau Federation in a case against the EPA, as well as Montrose Chemical and the Alliance for Constructive Air Policy. According to his official White House bio, Holmstead's work at the law firm "included a number of environmental issues--including many arising under the Clean Air Act."

From 1989 to 1993, he served as associate counsel to the first President Bush, advising him on environmental policy. Holmstead also served as an adjunct scholar for Citizens for the Environment, a libertarian group founded and funded by oil giants Charles and David Koch.

Now: Holmstead is overseeing the administration's overhaul of Clean Air Act rules, which will allow many industrial plants to expand without installing better pollution controls. When EPA scientists came up with data indicating that the administration's "Clear Skies" proposal would increase pollution, he reportedly replied, "How can we justify Clear Skies if this gets out?"

MARIANNE L. HORINKO

Acting Administrator, Environmental Protection Agency

Then: Before joining the EPA, Horinko was president of the environmental consulting firm Clay Associates, where she represented industry clients regulated by the EPA.

Now: Prior to taking over as acting administrator, Horinko was Assistant Administrator for the EPA's Office of Solid Waste and Emergency Response. In that capacity, she oversaw the Superfund program, which shrunk dramatically under her leadership. This year, the administration has added only 10 new sites to the list of Superfund cleanup projects, delaying work on 10 others. In explaining the decision, Horinko noted that the agency had to consider economic development benefits, as well as health risks.

BENNETT RALEY

Assistant Secretary for Water and Science, Department of the Interior

Then: As a lawyer, lobbyist, and property-rights activist in Colorado, Raley represented irrigators, water districts, and property-rights groups. In January 2000, Raley testified before the House on behalf of the National Water Resources Association in support of legislation that would weaken the Endangered Species Act. Raley was also a member of the Board of Litigation at Mountain States Legal Foundation, a law firm that has been described as the "litigating arm of the Wise Use movement," and the Defenders of Property Rights Attorney Network, a Washington-

based legal foundation dedicated to defending private property interests against government regulation.

Now: Raley has overseen a major shift in water policy, away from environmental protection and toward property owners' rights. In 2002, he allotted water from Oregon's Klamath River to irrigators rather than to endangered fish, leading to a massive salmon die-off.

#### PATRICIA LYNN SCARLETT

Assistant Secretary for Policy, Management, and Budget, Department of the Interior

Then: In 1979, Scarlett began working for the libertarian Reason Foundation, becoming its president and CEO in 2001. The Reason Foundation is funded by industry groups such as the American Forest and Paper Association, the American Petroleum Institute, American Plastics Council, Chevron Corporation, Dow Chemical, etc. The author of "A Consumer's Guide to Environmental Myths and Realities," Scarlett cites the following as common myths about the environment: Disposables Are Bad; We Are Running Out of Resources; Americans Are Especially Wasteful; etc. Scarlett was a board member of The Thoreau Institute which "seeks ways to protect the environment without regulation, bureaucracy, or central control."

In a 1997 editorial in Reason Magazine, Scarlett wrote, "Environmentalism is a coherent ideology that rivals Marxism in its challenge to the classic liberal view of government as protector of individual rights."

Now: Scarlett has increasingly become the public face of the department, particularly on Capitol Hill. She's behind the proposed privatization of National Park Service jobs, which environmentalists oppose, and has led the administration's opposition to making the Gaviota Coast of California into a National Seashore. Scarlett's explanation: she feels the Vandenberg Air Force Base officials and local agricultural interests will do a fine job of caring for the land on their own.

THOMAS SANSONETTI

Assistant Attorney General for Environment and Natural Resources

Then: As a member of the law firm Holland and Hart, Sansonetti lobbied on behalf of corporate mining interests, including Arch Coal and Peabody Coal. Since 1998, he has been a member of the Federalist Society, a conservative libertarian property rights group, which has opposed federal regulations under many environmental laws.

Now: Sansonetti is behind the Department of Justice's decisions to settle a string of lawsuits, giving up the government's legal right to protect millions of acres of wetlands and wilderness. Of Gale Norton, Sansonetti has said, "She understands the system. She is very good on national park issues and on Endangered Species Act law. There won't be any biologists or botanists...to come in and pull the wool over her eyes."

WILLIAM G. MYERS

Solicitor General, Department of the Interior

Then: Before joining the Bush administration, Myers held a number of jobs representing companies that use the public lands overseen by the Department of the Interior. He headed the National Cattlemen's Beef Association and, as a lawyer and lobbyist for the firm Holland & Hart, represented companies including Kennecott Energy and Peabody Coal. During his nomination process, he continued to represent banks in a lawsuit against the US Forest Service concerning ranchers' use of public lands.

Now: Along with Sansonetti, Myers has led the administration's established pattern of settling environmental lawsuits filed by industry -- a pattern that is rapidly eroding the legal underpinnings of many environmental rules. Myers' opposition to regulation was well-known long before he took his post as Gale Norton's top lawyer. "The biggest disaster now facing ranchers is not nature," Myers said in a speech before the

cattlemen's association, "but a flood of regulations designed to turn the West into little more than a theme park."

The department's Inspector General has launched an ethics inquiry of Myers, the third involving a top official at the department. The investigation was initiated after Friends of the Earth and Public Employees for Environmental Responsibility obtained Myers' office calendars, which showed him meeting with representatives of the cattle industry and members of his former law firm. In May, Bush nominated Myers to the U.S. Court of Appeals for the 9th Circuit.

#### MIKE SMITH

Assistant Secretary for Fossil Energy, Department of Energy

Then: For years, Smith operated an independent oil and gas company in Oklahoma, serving on the Oklahoma Independent Petroleum Association's board of directors from 1981 to 1995. In 1995, he became Oklahoma's Secretary of Energy, acting as the governor's representative to and Vice Chair of the Interstate Oil and Gas Compact

Now: Smith is an outspoken advocate of drilling in the Arctic National Wildlife Preserve, which he has described as "like a desert covered in snow." In a speech before the Independent Oil and Gas Association of West Virginia, Smith said, "The biggest challenge is going to be how to best utilize taxpayer dollars to the benefit of industry."

Among the initiatives Smith is assisting is a study to determine when it's environmentally safe for oil companies to transport heavy equipment over arctic tundra. Part of the funding for the study will be provided by Total, Anadarko Petroleum, and ConocoPhillips.

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**Source URL:** <http://www.motherjones.com/politics/2003/09/ungreening-america-behind-curtain>

## **Interior Dept. Official Facing Scrutiny Resigns**

By Elizabeth Williamson  
Washington Post Staff Writer  
Wednesday, May 2, 2007

A senior Bush political appointee at the Interior Department who revised scientific reports to minimize protection of endangered species has resigned, officials said yesterday.

Julie A. MacDonald, deputy assistant secretary for fish, wildlife and parks, had been criticized by Interior's inspector general, and Congress was preparing to scrutinize her performance in an upcoming hearing.

Interior Department spokesman Hugh Vickery confirmed MacDonald's resignation, delivered in a letter late Monday. Her departure came as the agency was discussing plans to demote her, said a person in the agency familiar with the matter. Vickery declined to comment on that possibility.

Reached at her home, MacDonald said that she resigned for personal reasons, including an illness in her family, and that "I have nothing but respect for people at the department." She would not comment on whether potential disciplinary action influenced her decision.

Environmental groups late last year documented a pitched battle between MacDonald and Fish and Wildlife Service employees over whether to safeguard plants and animals from oil and gas drilling, power lines, and real estate development.

In March, Inspector General Earl E. Devaney referred MacDonald's case to top Interior officials for possible administrative action. In an investigation, Devaney's office found that MacDonald, who has a degree in civil engineering and no science background, repeatedly instructed Fish and Wildlife scientists to change their recommendations on identifying "critical habitats."

MacDonald often argued with and mocked career staff members and scientist reports for urging that species such as the white-tailed prairie dog and the Gunnison sage grouse be classified as threatened or endangered, documents showed. After reviewing a scientific report on the possibility that a proposed road might further degrade the sage grouse's habitat, MacDonald wrote in the margin: "Has nothing to do with sage grouse. This belongs in a treatise on 'Why roads are bad?'"

Environmental groups praised her departure.



"Increasing transparency in the decision-making process would make other political appointees think twice before altering or distorting scientific documents," said Francesca Grifo, director of the Scientific Integrity Program at the Union of Concerned Scientists, which requested the documents under the Freedom of Information Act.

*Staff writer Juliet Eilperin contributed to this report.*

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## POLITICS

# Federal Oil Officials Accused In Sex and Drugs Scandal

*By Stephen Power*

Updated Sept. 11, 2008 12:01 a.m. ET

WASHINGTON -- Employees of the federal agency that last year collected more than \$11 billion in royalties from oil and gas companies broke government rules and created a "culture of ethical failure" by allegedly accepting gifts from and having sex with industry representatives, the Interior Department's top watchdog said Wednesday.

A report by the Interior Department's inspector general, Earl Devaney, described a party atmosphere at the Denver office of the Minerals Management Service, a bureau of the department. Some employees of the office, which houses the department's royalty-in-kind program, "frequently consumed alcohol at industry functions, had used cocaine and marijuana, and had sexual relations with oil and gas company representatives," the report said, adding that "sexual relationships with prohibited sources cannot, by definition, be arms-length."

The report also says that between 2002 and 2006, 19 employees in the agency's royalty-in-kind program, roughly a third of the program's total staff, had "socialized with and had received a wide array of gifts from oil and gas companies with whom the employees were conducting official business."

## RELATED DOCUMENTS

- Investigative Report of MMS Oil Marketing Group -- Lakewood
- Investigative Report of Gregory W. Smith

Mr. Devaney's blistering assessment spotlights the agency as Congress and the presidential candidates weigh proposals to expand offshore drilling. "We discovered a culture of substance abuse and promiscuity," his report said.

The Minerals Management Service oversees the nation's natural-gas, oil and other mineral resources on the outer continental shelf, and its duties include drawing up leases for drilling in offshore waters. In some years, it is the second-largest source of revenue for the U.S. Treasury, behind only the Internal Revenue Service. Through the royalty-in-kind, or RIK, program, the government receives oil instead of cash payments from energy companies in exchange for drilling rights.

"The activities at the [royalty-in-kind] office are so outlandish that this whole IG report reads like a script from a television miniseries -- and one that cannot air during family viewing time," House Natural Resources Committee Chairman Nick Rahall (D., W.Va.) said in a statement. "It is no wonder that the office was doing such a lousy job of overseeing the RIK program; clearly the employees had 'other' priorities in that office."

The report said that most industry representatives who were interviewed by the inspector general's office admitted buying meals, drinks and entertainment for government employees, but denied they were made in exchange for preferential treatment, according to the report.

### Gift Givers

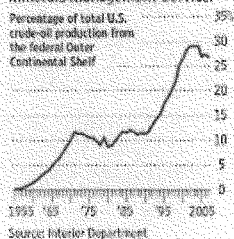
The report named four companies -- Chevron Corp., a U.S. unit of Royal Dutch Shell PLC, Gary-Williams Energy Corp. and Hess Corp. -- as gift givers. In a written statement Wednesday, the Shell unit said it cooperated fully with the investigation, but that it would be premature to comment on the report "until we have an opportunity to review the content." A spokesman for Hess said the company had cooperated with the inspector general's inquiry, and that the company's own investigation "indicated no wrongdoing" by employees. Officials at Gary-Williams Energy couldn't be reached Wednesday for comment.

Democrats seized on the inspector general's report as evidence of what they say is the Bush administration's cozy relationship with the oil industry. Congressional Republicans accused Democrats of not following up on earlier Republican-led investigations of possible wrongdoing within the bureau.

In a teleconference with reporters Wednesday, MMS director Randall Luthi said he didn't see any evidence that American taxpayers had been hurt financially by the alleged misconduct. But he said he took the report's findings "very seriously" and would review the allegations and consider taking appropriate action in the coming months.

### Below the Surface

As offshore drillings expands, so does the importance of the Minerals Management Service.



Mr. Luthi, who took office in July 2007, said the royalty-in-kind program generated tens of millions of dollars in additional government revenue during the most recent fiscal year, compared with what would have been received if the agency had taken its royalties in cash.

Wednesday's report is the latest black eye for the Minerals Management Service. In July, a former aide to the agency's associate director of minerals revenue management pleaded guilty in U.S. District Court to violating conflict-of-interest laws. The employee, Jimmy W. Mayberry, 65 years old, acknowledged helping create a consulting position that he later took after

retiring from government.

In a memo to Interior Secretary Dirk Kempthorne made public Wednesday, Mr. Devaney said his office had referred cases against two other former high-ranking MMS officials to the Justice Department, but the department had declined to prosecute.

Mr. Devaney said some MMS employees who acted inappropriately should be removed, but others had escaped punishment "by departing from federal service, with the usual celebratory send-offs that allegedly highlighted the impeccable service these individuals had given to the Federal Government. Our reports belie this notion."

The report also criticizes what it says was "the ultimate refusal of one major oil company, Chevron, to cooperate with our investigation." A spokesman for Chevron said Wednesday that the company couldn't comment on the report because it hadn't yet seen it. "We have cooperated with the government investigation and produced all of the documents that the government requested months ago," the spokesman said.

### Avoiding Payments

In recent years, the Interior Department has come under criticism from Mr. Devaney's office for mistakes at MMS that allowed oil companies to avoid paying royalties for offshore-drilling rights -- errors that government auditors have estimated will cost taxpayers as much as \$10.5 billion over about 25 years.

In May, a report by Mr. Devaney's office said an investigation of the program by his agents found that "the integrity of the RIK oil sales process is undermined by poor business practices," with companies often allowed to modify their bids after the deadline for submitting them. Of 718 bid packages awarded to companies between 2001 and 2006, Mr. Devaney's report said, 121 were modified, with only three modifications favoring the government. The value of the modified bid packages not in favor of the government totaled \$4.4 million, according to Mr. Devaney's May report.

Under the royalty-in-kind program, the government receives oil or natural gas instead of cash for payments of royalties from companies that lease federal property for oil and gas development. The government then sells the product into the marketplace and returns the proceeds to the Treasury. Interior Department officials say the program results in higher revenue collections and lower administrative costs.

Write to Stephen Power at [stephen.power@wsj.com](mailto:stephen.power@wsj.com)

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**Investigative Report of  
MMS Oil Marketing  
Group - Lakewood  
(Redacted)**



# Investigative Report

*MMS Oil Marketing Group - Lakewood*

Report Date: August 19, 2008

This report contains information that has been redacted pursuant to 5 U.S.C. §§ 552(b)(2), (b)(6), and (b)(7)(C) of the Freedom of Information Act. Some references indicating gender were written in the masculine form to protect the identities of individuals and to facilitate the reading of the report. Supporting documentation for this report may be obtained by sending a written request to the OIG Freedom of Information Office.

## **RESULTS IN BRIEF**

We initiated this investigation in July of 2006 after receiving allegations from a confidential source (CS) that improprieties were occurring within the Minerals Management Service's (MMS) Royalty in Kind Program (RIK).

The CS specifically alleged that RIK marketers had developed inappropriate relationships with representatives of oil companies doing business with the U.S. Department of the Interior (DOI). The CS asserted that the inappropriate relationships included RIK employees frequently attending oil and gas industry social functions and accepting gifts from company representatives.

Our investigation confirmed that between January 1, 2002, and July 2006, 19 RIK marketers and other RIK employees – approximately 1/3 of the entire RIK staff – had socialized with, and had received a wide array of gifts from, oil and gas companies with whom the employees were conducting official business. With respect to eight specific RIK employees, these gifts exceeded the allowable limits.

We also discovered that two of the RIK employees who accepted gifts also held unauthorized outside employment. Both of these employees had failed to seek MMS approval for their outside work and similarly failed to report the income they received from this work on their financial disclosure forms. In addition, we learned that one MMS employee, not affiliated with the RIK Program, had received approval for outside work but had failed to report the income received from it.

Finally, our investigation revealed an organizational culture lacking acceptance of government ethical standards, inappropriate personal behaviors, and a program without the necessary internal controls in place to prevent future unethical or unlawful behavior.

We are forwarding this report to the Assistant Secretary for Land and Minerals Management for whatever adverse action he deems appropriate for the DOI employees involved.

## **BACKGROUND**

### **Minerals Management Service**

MMS manages the nation's natural mineral resources on the Outer Continental Shelf and on some federal and Indian lands. MMS also collects, accounts for, and disburses more than \$8 billion per year in revenue from these offshore and onshore mineral leases. Two major programs comprise MMS – Offshore Minerals Management and Minerals Revenue Management (MRM). Offshore Minerals Management manages the mineral resources in federal waters, while MRM is responsible for managing all revenues associated with offshore and onshore federal mineral leases. Together, these programs are one of the federal government's greatest sources of non-tax revenues.



MRM processes rents and royalties from nearly 70,000 leases annually and employs approximately 600 federal and 300 contract personnel. The Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701, and the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, 30 U.S.C. § 1701, form the basis for MRM oversight and regulatory enforcement activities.

MRM collects royalties from oil and gas companies through requirements established in two types of leases. Royalty in Value (RIV) leases require that the lessee pay the federal government, through MRM, a percentage of the monetary value of the oil or gas brought to the market. RIK leases differ in that MRM takes possession of a percentage of the product (oil or gas) at a designated delivery point, which is often the platform where the oil or gas is brought to the surface. MRM then markets and sells it.

According to statistics maintained by MMS, RIK sells over 800 million cubic feet of natural gas and 150,000 barrels of oil every day. The value of RIK oil and gas sales in fiscal year (FY) 2006 was reported at over \$4 billion, or approximately \$11 million per day.

In addition to marketing and selling oil and gas, RIK is responsible for transporting and processing these products. Because RIK does not own or operate any pipelines or processing plants, it contracts with oil and gas companies for these services. At the end of FY 2006, RIK reported holding 32 contracts for the sale or exchange of oil and gas. During this same period, it also held 97 contracts for transportation, processing, and miscellaneous services. These 97 contracts were valued at approximately \$29 million.

### RIK

MMS initiated a feasibility study in 1997 of the U.S. Government taking its oil and gas royalties in kind, rather than in value, and then competitively selling the commodities on the open market. The study concluded that this approach would not only be workable but would also be more efficient for both MMS and the industry. Further, the study team concluded that this approach would be revenue neutral or positive.

After a series of successful pilot projects, MMS published the *Road Map to the Future: Implementing Royalty in Kind Business Processes and Support Systems*. The *Road Map* called for full implementation of the RIK Program by December 2003. MMS then engaged a well-known energy consulting group to help develop RIK's first 5-year plan, which was published in May 2004.

The RIK Program director reports directly to the MRM associate director in Washington, D.C. Despite being located in Lakewood, CO, the deputy associate director for MRM has no line or supervisory authority over the RIK Program director or the program's personnel.

Between approximately 2001 and 2004, Gregory Smith served as the deputy program director of RIK. He then served as the director in 2005, until January 2007 when he was detailed to another section within MRM. Smith, as the RIK director, reported directly to Associate Director Lucy Querques Denett in Washington, D.C. Smith retired on May 26, 2007.

RIK Program employees work in four separate areas: the "Front Office" which markets and sells oil and gas; the "Mid Office," which handles contracting, risk control, and credit issues; the "Back Office," which handles accounting functions; and the "Economic Analysis Office," which helps evaluate bids and measures the performance of RIK contracts. *Agent's Note: The RIK Program set up its organizational structure to mirror a standard oil or gas company infrastructure.*

The RIK oil and gas marketers who are assigned to the "Front Office" are responsible for gathering and analyzing information concerning MMS leases and the feasibility of converting RIV leases to RIK leases. In addition, they gather and analyze information on the sale and transportation of oil and gas and use it to determine the best possible disposition for RIK's oil and gas. Most significantly, they receive, review, and select bids submitted by oil and gas companies on RIK properties and work with industry personnel on modifications to sales and other contracts. Due to the nature of their responsibilities, RIK oil and gas marketers interact extensively with oil and gas industry representatives.

### Applicable Regulations, Standards, and Policies

All MMS employees are subject to a myriad of federal ethics standards, regulations, and DOI policies that serve to govern their personal behavior. Those noted below are particularly germane to this investigation.

The *Standards of Ethical Conduct for Employees of the Executive Branch* states the following, in part:

[Employees] shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards .... Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts (5 CFR 2635.101(b)(14))....[Employees] shall not, directly or indirectly, solicit or accept a gift:(1) From a prohibited source; or (2) Given because of the employee's official position (5 CFR §2635.202(a))....[Employees] may not accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using public office for private gain (5 CFR 2635.202(c)(3)).

*Agent's Note: A prohibited source is defined by regulation as "any person, company, or organization that conducts business with or is seeking to conduct business with the employee's agency, or that has any interest which may be affected by the employee's official duties."*

Further, the Office of Government Ethics has issued a regulation that allows only limited circumstances in which employees may accept gifts from prohibited sources. Specifically, unsolicited gifts valued at \$20 or less, per occasion, may be accepted. However, gifts from any single prohibited source may not exceed \$50 in any given calendar year.

### Outside Employment Policy

MMS policy requires that all of its employees who wish to engage in outside employment report this employment to their supervisor for approval or denial. This process is documented through the employee's completion of a "Request to Engage in Outside Work or Activity" form, which must be signed by the employee, his or her supervisor, a management official, and a representative of the MMS Ethics Office.

This process is intended to ensure that an employee's outside employment does not conflict with the primary responsibilities to MMS. In addition, earned income exceeding \$200 from any outside employment must be reported on the employee's "Confidential Financial Disclosure Report" (Office of Government Ethics Form 450).

## **DETAILS OF INVESTIGATION**

In July 2006, we began this investigation after receiving allegations from a confidential source (CS) concerning improprieties occurring within the MMS RIK Program. The CS specifically alleged that RIK marketers had developed inappropriate relationships with representatives of oil companies doing business with DOI. The CS claimed that the inappropriate relationships included RIK employees frequently attending oil and gas industry social functions and accepting gifts from company representatives.

We focused our initial investigation on the specific allegations made by the CS and later expanded our investigation to include unreported outside employment and/or income. We also spent considerable time examining the organizational culture of RIK, which appeared to be devoid of both the ethical standards and internal controls sufficient to protect the integrity of this vital revenue-producing program.

Recognizing the investigative challenges associated with a complex program such as RIK, we created an investigative team composed of criminal investigators, computer forensics specialists, criminal research specialists, and auditors. During the course of the investigation, we conducted over 100 interviews with MMS employees and industry representatives, many multiple times, and ultimately reviewed thousands of e-mails, company expense records, contract files, and other relevant documents. We sought and obtained numerous individuals' personal banking records as well as expense reports and related records from four specific oil and gas companies. ***Agent's Note:** Between October 2007 and May 2008, we undertook extensive efforts to interview five Chevron employees. Despite these efforts, these employees ultimately declined to be interviewed. Additionally, a former Shell employee declined to be interviewed by DOI-OIG agents.*

We have organized our investigative findings into two sections. The first section briefly summarizes the programmatic failures identified during the course of our investigation, which created the environment in which RIK employees socialized with, and accepted gifts from, industry representatives without regard for ethical standards, regulations, and DOI policies. The second section of the report describes, by employee, specific misbehavior as well as the statements made by those employees and relevant industry representatives.

## I: Programmatic Failures

### **Ethical Failures**

During the course of this investigation, we learned that 19 RIK employees had accepted gifts from prohibited sources in the oil and gas industry from 2002 to 2006. However, we focused our attention on only current MMS employees who had accepted unsolicited gifts of \$20 or more on any one occasion and/or on current employees who exceeded the \$50 gift threshold in any given year. *Agent's Note: We also determined that a number of former MMS employees had exceeded the dollar thresholds as well. However, we decided not to pursue these violations given the lack of an administrative remedy for DOI to take.*

Using these criteria, we ultimately examined the ethical behavior of nine employees. While the documented dollar amount of gifts for these employees was less than \$7,000, the frequency of the gifts was quite disturbing. In particular, two RIK marketers received combined gifts on at least 135 occasions from four major oil and gas companies who meet the definition of prohibited sources. During this same period of time, both of these employees also received cash awards from MMS of approximately \$10,000 each.

Our investigation revealed that many RIK employees simply felt that federal government ethics standards and DOI policies were not applicable to them because of their "unique" role in MMS. When interviewed, many RIK employees said they felt that in order to effectively perform their official duties, they needed to interact in social settings with industry representatives to obtain "market intelligence." Some felt their free attendance at industry functions was an absolute necessity given that it was industry's practice to conduct business over lunch, dinner, and golf outings.

One RIK employee opined that because RIK regularly paid a major producer to transport oil, it was perfectly appropriate for him to attend a "treasure hunt" in the desert with all expenses paid by the producer. Another RIK employee went so far as to say RIK's goal was to be "part of industry."

When we interviewed the industry representatives, most readily admitted that they purchased meals, drinks, and other items of entertainment for RIK employees, but they denied that these purchases were in exchange for any type of official act or preferential treatment. Some representatives said they treated RIK personnel as though they were "partners" or their "customers," given the business relationship between RIK and their respective companies.

Several industry representatives discounted the argument that DOI employees needed to participate in industry events to effectively perform their official duties. One representative denied that business was even conducted at these social events. He stated that business was rarely discussed among the attendees and that the main purpose of industry social events was entertainment. "It was about the skiing," he said.

In e-mails we retrieved from RIK employees' computer hard drives and network servers, we found numerous indications that many of the events that RIK employees attended with industry officials were purely social. For instance, one e-mail from Shell Pipeline Company representative to RIK employee Crystal Edler, regarding attending "tailgating festivities" at a Houston Texans game, stated, "You're invited ...have you and the girls meet at my place at 6am for bubble baths and final prep. Just kidding ...."

The Shell Pipeline Company representative's previous e-mail inviting people to the event was laden with sexual innuendo such as, "We've always provided the patrons with beer on demand, but the ever-depleting supplies have dwindled beer storage to dangerously low volumes on occasion....Although it's a given that the horsemen will indeed 'bring the meat to the table.'" *Agent's Note: The Shell Pipeline Company representative declined to be interviewed.*

Most industry representatives claimed to be unaware of federal ethics rules and regulations governing the acceptance of gifts from oil and gas companies. However, representatives from one major oil company said RIK employees seemed to operate differently than Department of Energy (DOE) officials, whom they said routinely declined meals and other gifts when offered. *Agent's Note: The industry works with DOE officials mostly on the Strategic Petroleum Reserve initiative.*

Since our investigation revealed that virtually all of the subject RIK employees had attended their annual ethics briefings over the entire 5-year period of time in question, it is *prima facie* that these employees knew they were violating government ethics standards when they accepted gifts from prohibited sources.

In fact, we even found evidence to suggest that some RIK employees took steps to keep their social contacts with industry representatives a closely held secret. For example, several RIK employees told investigators that one RIK supervisor admonished her staff not to discuss these travel activities in the RIK office. We also found e-mails where RIK employees preparing to attend industry events used language such as "this trip is to be kept quiet," or they were asked to RSVP "in private" by their supervisor. When we asked one of these employees why they needed to avoid discussing their social activities with industry, he responded with a slight chuckle, "They might have, you know, contacted the [Inspector General]."

Most importantly, toward the conclusion of our investigation, we discovered a document titled, "Initiative to Clarify Guidance for RIK Interaction with Industry," which indicates that in the summer of 2006, a group of key RIK employees were seeking ways to codify their "uniqueness" and to craft new guidance for themselves different from that which governs all other federal employees. The document states the following, in part:

[I]t is clear that the Federal government ethics/procurement rules do not offer unambiguous guidance to RIK staff and management. It seems logical that these rules/policies, developed in the context of government in an adjudicator role for the regulated community, do not provide clear guidance, since they did not envision government as business counterplay in a commercial marketplace.

A former MMS contracting officer confirmed to us that this study group was formed in approximately June 2006 in an attempt to “see what’s legal, what isn’t, where the boundaries ought to be with the RIK folks.”

In a recovered e-mail dated June 6, 2006, Associate MMS Director for Administration and Budget, Bob Brown, gave approval to a number of MMS employees to join this group to “study and create business/ethics rules and guidance for the RIK program.” The e-mail further indicated that RIK Director Gregory Smith had requested this action and also that Brown and Associate MMS Director Lucy Querques Denett had agreed to serve as “executive sponsors” of the group.

We interviewed former RIK Director Gregory Smith on one occasion under a proffer agreement between Smith and the Department of Justice (DOJ). Smith insisted that he saw nothing wrong with, and had actually approved, RIK employees attending industry events and/or accepting meals and drinks from oil and gas companies doing business with DOI. Some RIK employees we interviewed confirmed that Smith encouraged them to attend industry social events.

When we interviewed MMS Associate Director Lucy Querques Denett, she stated that prior to our investigation, she was unaware that RIK employees had been accepting gifts and/or gratuities from the oil and gas industry.

We interviewed MRM Deputy Associate Director Deborah Gibbs Tschudy, who explained that oil and gas industry representatives were well known for providing gifts to each other, which she said was the “oil and gas industry marketing culture.” Tschudy commented that this was a normal business practice for them. She stated that it was not acceptable for the industry to treat RIK employees as they treated other industry customers. She added, “We don’t have to do that to be successful in the RIK Program....People want our production...[and] there’s no reason for us to have to [accept gifts] to be able to be part of the market.”

*Agent’s Note: While Denett and Smith will be mentioned frequently in this report, both are subjects of two separate investigations being pursued by this office. Therefore, any potential improprieties on their part will not be detailed in this report. Deputy Associate Director Tschudy served as the Acting Director of RIK during 2007 and has been cooperative with this investigation. She is also playing an instrumental role in adopting recent OIG audit and investigative recommendations regarding the RIK Program.*

#### **Improper Personal Conduct**

During the course of our investigation, we learned that some RIK employees frequently consumed alcohol at industry functions, had used cocaine and marijuana, and had sexual relations with oil and gas company representatives.

Our investigation disclosed that alcohol was available at most or all of the industry events attended by RIK employees. For instance, we learned that two RIK employees who had attended a daytime industry-sponsored event had later spent the evening in lodging provided by that company because they were too intoxicated to safely drive to a nearby hotel. When we

interviewed the employees involved, they insisted that they were developing business relationships and had gathered valuable industry-related information by attending this event. Other witnesses we interviewed stated that RIK employees “partied” frequently with oil and gas industry representatives and that these two RIK marketers were commonly referred to by industry representatives as the “MMS Chicks.”

Given the depth of this investigation, we were not surprised when we uncovered recreational marijuana and cocaine use by a handful of RIK employees. As noted above, our investigation also disclosed that two RIK marketers had engaged in brief sexual relationships with representatives from companies doing business with DOI. Neither of the employees deemed it appropriate to recuse themselves from work involving the companies these officials represented.

### **Internal Control Failures**

Our investigation disclosed that the RIK Program’s *RIK Procedures Manual* was intended to be used to document the program’s operating processes. While the manual provided a list of “Front Office” duties and responsibilities, it did not contain detailed procedures on how these duties and responsibilities were to be performed. Specifically, there were no written procedures or guidelines in the *RIK Procedures Manual* regarding the overall oil and gas sales process. For instance, the manual did not contain policy or guidance on the following internal control procedures:

- Analyzing bids
- Developing “Minimum Acceptable Bids” and related target ranges
- Amending bids
- Awarding a bid to a bidder other than the highest bidder
- Deciding which bid packages will be awarded on a fixed-roll basis
- Documenting decisions reached during the bidding deliberative process

Throughout our investigation, we heard that the oil and gas industry preferred the RIK Program to the RIV Program. One RIK marketer explained this preference to us as follows: “There is definitely an advantage to the industry, so that they wouldn’t have to be subject to audit.”

*Agent’s Note: As our investigators brought our concerns to the attention of MMS personnel, we noticed additional guidance regarding the RIK sales process being developed. Our audit office performed a more thorough review of RIK’s management controls over the RIK sales process, including any policy or guidance that was issued during our investigation.*

### **II: Individual Employees**

What follows are detailed discussions of the improper behavior of eight specific individuals working in the RIK Program who actually exceeded the gift limits and should be considered for adverse action by DOI. In each discussion, we start by laying out the evidence of gifts or other improper behavior we discovered. This will be followed by a detailed discussion of what both the employee told us about the gifts and any relevant interviews with oil and gas company

representatives or other witnesses. In addition, we learned that one MMS employee, not affiliated with the RIK program, had received approval for outside work but failed to report the income received from it.

We determined Chevron, Shell, Gary Williams Energy Corporation (GWEC), and Hess Corporation (Hess) provided gifts to RIK employees. Each of these four companies maintained a business relationship with RIK and is therefore considered a "prohibited source." Shell and Chevron conducted business with RIK as both producers on leases where MMS took royalties in kind and as purchasers of RIK oil. Although they did not produce oil and gas on MMS leases, GWEC did purchase RIK products through RIK's Small Refiner Program. Hess operated MMS leases on which royalties were taken in kind but did not actually bid on RIK oil.

While some gifts' values were easy to determine, meals and drinks were difficult to attach a value to, especially when the attendees included both RIK employees and industry representatives. Therefore, for purposes of calculating the approximate value of meals and drinks received by RIK employees, we simply divided the total cost of the meal as reported on the company expense reports by the total number of persons who attended the event. For example, if an RIK employee and three industry representatives attended a dinner, and the total cost of the meal shown on an industry expense report was \$400, then a \$100 gift was attributed to the RIK employee.

*Agent's Note: During the course of our investigation, we informed Secretary Dirk Kempthorne and Assistant Secretary for Land and Minerals Management Stephen Allred of the improper behavior we were uncovering within the RIK Program. The Secretary immediately directed Assistant Secretary Allred to transfer RIK employees Greg Smith, Crystel Edler, and Richard Fantel out of the RIK Program after we specifically identified their personal behavior as particularly troubling. Stacy Leyshon had previously been transferred out of the RIK Program.*

#### 1. Stacy Leyshon

Stacy Leyshon has been employed by MMS since 1986. Between 2002 and 2007, she worked as a supervisory minerals revenue specialist in RIK. During her first few years in this position, she supervised the RIK employees in the "Front Office" who were responsible for marketing RIK oil, as well as those in the "Back Office," who handled RIK accounting functions. After a reorganization within RIK, Leyshon became responsible for only the Front Office, which contained a staff of approximately five employees.

A review of Leyshon's training records disclosed that she received ethics training in 2000, 2002, 2003, 2004, and 2006. While there was no information in the DOI Ethics Office training files documenting Leyshon's attendance at ethics training in 2005, we found several e-mails showing that in 2005, RIK received ethics training, in conjunction with EEO training, provided by the MMS Western Administrative Service Center. In addition, we found Leyshon sent an acceptance e-mail in response to the mandatory training notice. A review of Leyshon's cash awards from MMS for 2002 through 2006 revealed that she received \$10,450.



Through witness interviews and a review of oil and gas company expense records and other documentation, we found that between 2002 and 2006, Leyshon attended a myriad of events hosted and paid for by oil and gas industry representatives. We also found that she accepted golf, lodging, ski-related costs, and other gifts, often in the form of meals, from oil and gas companies.

*Agent's Note: We provided OIG subpoenas to the above-noted four oil and gas companies for all of their expense accounts and any other documents that indicated gifts were given to RIK employees. The information received is arrayed in this report in a series of charts for each individual. However, total amounts shown most likely do not reflect the totality of gifts given to RIK employees because certain gifts do not lend themselves to industry expense reports, i.e. free lodging or company-owned tickets to sporting events. Therefore, dollar amounts shown should be considered by the reader as a conservative accounting that needs to be viewed in conjunction with witness testimony.*

Specifically, industry expense reports and other documentation indicate that Leyshon accepted gifts valued at approximately \$2,887 from Chevron, Shell, and GWEC on at least 74 occasions between 2002 and 2006, as follows:

|              | CHEVRON   |                | SHELL     |              | GWEC      |                | TOTAL     |                |
|--------------|-----------|----------------|-----------|--------------|-----------|----------------|-----------|----------------|
| Fiscal Year  | Gifts     | Value          | Gifts     | Value        | Gifts     | Value          | Gifts     | Value          |
| 2002         | 3         | \$29           | 3         | \$257        | 4         | \$62           | 10        | \$348          |
| 2003         | 11        | \$209          |           |              | 3         | \$25           | 14        | \$234          |
| 2004         | 22        | \$505          | 6         | \$382        | 5         | \$488          | 33        | \$1,375        |
| 2005         | 9         | \$340          | 2         | \$80         | 4         | \$472          | 15        | \$892          |
| 2006         |           |                | 1         | \$17         | 1         | \$21           | 2         | \$38           |
| <b>Total</b> | <b>45</b> | <b>\$1,083</b> | <b>12</b> | <b>\$736</b> | <b>17</b> | <b>\$1,068</b> | <b>74</b> | <b>\$2,887</b> |

As shown above, our review of Chevron representatives' expense reports disclosed that Leyshon was listed 45 times between 2002 and 2006. These entries include meals and drinks, an appreciation dinner, and a paintball outing.

Our review of Shell representatives' expense reports and other documentation disclosed that Leyshon received approximately 12 gifts from Shell between 2002 and 2006. The expense report entries reflect mostly the purchase of meals and drinks. In addition, interviews and record reviews disclosed that Leyshon attended several of Shell's customer appreciation dinners and customer appreciation outings.

Our review of a GWEC representative's expense reports and other documentation disclosed that Leyshon was provided 17 gifts between 2002 and 2006. The gifts Leyshon received included meals, drinks, and golf outings.

GWEC holds an annual customer appreciation golf tournament in Colorado and customarily covers participants' expenses associated with the tournament, including golf-related fees, breakfast, lunch, and dinner. Participants also receive a complimentary gift, such as a golf bag, luggage, jacket, or sunglasses. GWEC's annual tournament is also timed to correspond with a local sporting event, such as a PGA tournament or a Colorado Rockies baseball game. GWEC normally covers the costs for participants to attend these events. According to GWEC records, Leyshon attended this customer appreciation event in 2004 and 2005.

Two witnesses recalled Chevron receiving a contract amendment after Jeff Brough, a Chevron trader, made an error on a bid. Interviews disclosed that Brough was responsible for preparing Chevron's bids on MMS oil properties. While preparing the bid in question, he neglected to include a transportation cost, thereby making his bid both inaccurate and potentially a career-ending event with huge financial consequences for Chevron. One witness reported that both Stacy Leyshon and Crystel Edler, RIK marketers, told her they assisted Brough after he made a significant error on a bid. The witness speculated that the error could have cost Brough his job.

*Agent's Note: The term amendment refers to instances where apparently RIK allowed companies to actually revise their bids, even after an award had been made. We could not find any written policies allowing this practice although we did learn that it happened often. Apparently, company representatives would contact the RIK marketing staff to request amendments, and after approval by Leyshon, they would be forwarded to the RIK Director for final approval. The contracting officer would then process the approved amendments. Our Royalty Initiatives Group reviewed 121 amendments, only three of which favored the government. They estimated the value of the amendments not in favor of the government to be approximately \$4.4 million.*

The CS in this case also told us about a sex toy business that Leyshon owned and advertised by passing out business cards at work. According to the CS, Leyshon had bragged that she made more money with this business than her salary at MMS.

We interviewed Leyshon three times. When she was first interviewed concerning these matters, she provided a signed sworn statement in which she acknowledged attending annual ethics training and understood that, as a government employee, she could only accept gifts valued up to \$20 per occasion and totaling no more than \$50 annually. She also said she understood that individual purchasers and distributors from the oil companies were considered prohibited sources. It should be noted that in the later two interviews, done under a proffer agreement between DOJ and Leyshon, she was considerably more forthcoming and claimed that she had not included pertinent information in her signed sworn statement because she had difficulty remembering which events she attended, on which dates.

In her first interview, Leyshon said she made sure the amount the oil companies paid for RIK employees' meals was under the allowed amount of \$20 per employee. In a later interview, Leyshon admitted that she probably had exceeded the gift threshold. She added that she never kept track of the value of the dinners, drinks, and other gifts she received from industry representatives. In her later proffer interviews, Leyshon recalled with more detail and specificity the gifts she received. Additionally, Leyshon stated that she never reported any of these gifts on

her Confidential Financial Disclosure Reports (CFDR) because they did not fall within the reporting requirements.

*Agent's Note: A December 12, 2007 legal opinion issued by the OIG's Office of General Counsel opined that a confidential financial disclosure filer who received multiple benefits in connection with his/her attendance at a single event must treat the entire package of benefits as a single gift for the purpose of determining whether the gift meets the reporting thresholds of \$114 and \$285. While the total value of the items Leyshon received in connection with the GWEC golf tournament exceed the CFDR reporting requirements in 2004 and 2005, the legal opinion also points out that the form's instructions in 2004 and 2005, as well as relevant regulatory examples at that time, did not provide clear guidance for the filer.*

Leyshon stated that she frequently dined with Chevron employees because Chevron was one of RIK's major customers. She also said she attended Chevron's Customer Appreciation dinner in San Francisco, CA, and characterized the dinner as a "widely attended event." Leyshon noted that she did not consult with anyone in the MMS Ethics Office about attending the event but that she routinely advised Greg Smith when she attended these types of gatherings.

Leyshon acknowledged that she accepted meals and drinks from Shell representatives but could not estimate how much or how often. She recalled that she also went to Shell's customer appreciation dinners two or three times, where she accepted meals, a silver serving dish, and a dip bowl. She claimed that she donated the silver dish and the dip bowl to charity.

She also admitted to attending Shell's customer appreciation outings in Colorado in 2002, 2004, 2005, and 2006.

In 2002, Shell provided Leyshon with lodging and golf in Keystone, CO. Leyshon stated that she did not reimburse Shell for her lodging expenses. She explained that she and Crystel Edler, who also attended this same event, had accepted lodging from Shell but had bought breakfast for their Shell hosts the next morning. According to Leyshon, by providing breakfast, she and Edler had provided an item of "equal value" for the cost of the lodging.

Leyshon recalled that she and Edler had not originally planned to spend the night in lodging provided by Shell but had planned to stay at a hotel room she and Edler had reserved. She explained that after she and Edler consumed "some alcohol," a Shell employee suggested that it would be unsafe for them to drive to their hotel. Leyshon said they then stayed at Shell's lodging.

In 2004, Shell provided Leyshon with lodging and paid for her ski costs in Keystone, CO. Leyshon said she did not reimburse Shell for these expenses but claimed to apply the "reciprocal" or "equal value" logic by providing "a bunch of alcohol" valued at approximately \$60 for those in attendance.

In 2005, Leyshon stayed in lodging in Breckenridge, CO, paid for by Shell but claimed she paid her own skiing costs and provided bank statements showing she paid for her lift ticket.

Finally, in 2006, Leyshon again skied with Shell employees in Breckenridge, CO, but claimed that she paid her own skiing and did not spend the night. She stated that she attended dinner with Shell employees while she was in Breckenridge but could not remember who paid.

Leyshon claimed that she attended these events to build relationships with oil and gas company officials while in a relaxed setting. She continually referred to these events with industry as "widely attended events," which she felt made them permissible. She even opined that playing in a golf tournament was acceptable under this theory. Leyshon noted that industry officials routinely conducted business during such events and claimed that without these relationships, RIK personnel could not obtain information on how the industry operated and how to effectively transport and market RIK oil.

To illustrate her point, she provided the interviewing agents with a copy of a letter she had once provided to an MMS ethics officer in which she justified playing in a golf foursome as a legitimate business opportunity for RIK. In this letter, she stated the following:

...the host company strives to place companies, MMS included, with overlapping interests on the same foursome. This provides an opportunity to discuss and share information related to our overlapping interests where we would not be able to otherwise. With the oil industry having fewer and fewer players, much of the information shared is then passed on to others in the industry and future discussions occur.

With respect to GWEC, Leyshon acknowledged that she did accept meals, drinks, and golf fees from Don Hamilton, a GWEC employee. She said she was unable to estimate the costs of these gifts. However, Leyshon claimed that on several occasions, she had paid for everyone's dinner while dining with GWEC employees and had specifically purchased drinks for Hamilton before.

Leyshon admitted that she attended two GWEC golf tournaments but could not recall the years in which she attended. She stated that she did accept the gifts that GWEC provided to the golf tournament attendees, which included luggage one year and a golf bag one other year. Once again, she claimed that she had donated the luggage and golf bag to Goodwill "pretty quickly" after receiving them. Leyshon also admitted to accepting PGA tournament tickets from GWEC.

Leyshon consistently claimed that she had donated all gifts provided to her to charity, but she was unable to produce any receipts documenting these donations.

In one of her interviews, Leyshon stated that she took annual leave to attend industry sponsored events. In another interview, she said she could not remember if she took annual leave to attend industry functions. *Agent's Note: We reviewed Leyshon's leave records and found that in some instances she did appear to take annual leave during industry sponsored functions. For instance, Leyshon took leave in 2002 that appears to coincide with the Business Women in Petroleum golf tournament, and she took annual leave in 2004 during the GWEC golf tournament and the associated PGA tournament. In addition, she took leave in 2006 during the time of Shell's annual customer outing. Because we could not confirm the exact dates of these events, we could not match them to the exact dates of Leyshon's leave.*

In regard to RIK marketers advocating for companies to receive amendments to their bids, Leyshon said that if an amendment “made sense” to the RIK staff, they “would advocate for it.” Leyshon said she remembered Chevron receiving an amendment after Jeff Brough, a Chevron representative, forgot to add costs related to a “leg” of pipe in his bid. She said that if RIK had awarded the contract to Chevron without allowing it to revise its bid, RIK would have been “ripping them off.” She further stated that “it was an honest mistake and I felt we should rectify it.” *Agent’s Note: Brough refused to be interviewed by DOI-OIG agents.*

Leyshon also told investigators that she had intimate relationships with two oil company representatives. Specifically, Leyshon said she had a sexual relationship with an employee of a company that had “Pacific” in its name. According to Leyshon, “Pacific” did not bid on or transport RIK oil. She also admitted to having a “one-night stand” with a Shell employee. She said she did not subsequently recuse herself from work involving Shell because she only had a “one-night stand” with its employee and did not think this would affect RIK business. She stated that this employee did not prepare Shell’s RIK bids.

In her earlier sworn statement, Leyshon wrote, “I do not have any inappropriate relationships or personal relationships with any of the representatives from the various companies.” When asked about the discrepancy between her sworn statement and statements made during her later interview, Leyshon explained that she did not think her relationships with these employees were inappropriate and she did not consider a “one-night stand” to be a personal relationship.

Leyshon referenced a study group formed within RIK in 2006 to determine if RIK needed to operate under its own special ethical guidelines, apart from the DOI guidelines. She said, “I think [Smith and Mary Ann Seidel, DOI Ethics Office,] put together a group of people to look at the ethics around RIK and what we were ... allowed to do and what we weren’t allowed to do.”

Leyshon denied that she had ever provided preferential treatment or confidential information to any industry official. She also stated that she had never observed any RIK employee providing preferential treatment to any oil or gas company.

Leyshon admitted to the interviewing agents that she had outside employment with the “Passion Party” company; however, she said she had obtained the appropriate approvals from MMS. She claimed that no one from industry had ever purchased products from her but she admitted that some of her subordinates, including Fantel, Edler and Hogan, had. Leyshon denied advertising Passion Parties at work.

*Agent’s Note: A review of Leyshon’s ethics file revealed that on March 16, 2005, Leyshon requested approval to engage in outside employment with Passion Parties, Inc. According to the request, Leyshon would be selling sensual products and planning parties. This request was approved in April 2005. Leyshon reported her income and her position with Passion Parties Inc., on both her 2005 and 2006 OGE 450s).*

One MMS employee told us that when she questioned Leyshon about the appropriateness of oil companies paying for RIK employees' meals, Leyshon responded that this was the "RIK way of doing business."

Leyshon told investigators that she "had a hit every once in a while" in reference to her use of marijuana but noted that this never occurred at the MMS office.

When interviewed, Michael Faulise, Director of Marketing for Shell Exploration and Production Company (Shell E&P), stated that he had worked for Shell since 2000 and one of his principle contacts at RIK was Stacy Leyshon. Faulise made the general comment that the main purpose of skiing or golfing events hosted by Shell was entertainment and that business was rarely discussed among the attendees. He further stated that people would never receive business information from him during social events. He said he thought of RIK as a fellow industry partner. When asked, Faulise stated that he was unable to recall Leyshon ever paying for any lodging or meals provided by Shell.

We also interviewed Shell E&P's manager of crude oil and logistics, Barbara Layer. The interview occurred under a proffer agreement between Layer and DOJ. Layer identified Leyshon as one of her main contacts at RIK and stated that she treated Leyshon and other RIK employees as "working interest partners" who were often invited to Shell events and meals. She specifically remembered Leyshon attending multiple Shell events at Keystone Ski Resort in Colorado and holiday parties in New Orleans.

With respect to the Keystone event, Layer remembered that Leyshon stayed overnight in the Shell-owned lodge, "Dutchman Haus," because she had too much to drink. Layer was unable to recall any instance in which Leyshon reciprocated or purchased anything of value for Shell employees.

We interviewed a senior crude oil trader for Shell Oil Trading Company regarding his relationship with Stacy Leyshon pursuant to a DOJ proffer agreement. The senior trader said he had heard Leyshon and Edler referred to by other Shell employees as the "MMS Chicks" who often drank too much and conducted themselves in an unprofessional manner. Because of their reputation, the senior trader claimed that he made the personal decision not to socialize with any RIK employee and that he had never provided an RIK employee with a gift. When told that RIK employees claimed that they had to socialize and take gifts from the industry to do their jobs well, the senior trader said this claim was "absolutely false."

Pursuant to a DOJ proffer agreement, we interviewed former Shell Trading Company trader Alan Raymond regarding Stacy Leyshon, whom he identified as one of his main RIK contacts. Raymond said he viewed RIK as "just another oil exploration company," and, therefore, providing RIK employees with gifts and entertainment was "relationship building." He claimed that his superiors at Shell Trading Company had approved of providing gifts and entertainment to RIK employees.

Raymond explained that "relationship building" enhanced assistance from other oil company players on market-related issues. He explained, "You never know when you're going to have a

need to pick up the phone and be helped.” However, Raymond made a distinction between RIK and DOE employees with regard to accepting gifts. In particular, he recalled that DOE employees were much more conservative about accepting gifts. For instance, he remembered that his boss had once directed him to provide pens to DOE employees but had insisted that they not cost more than \$20.

We interviewed Don Hamilton, Vice President of raw materials supply for GWEC, who confirmed that RIK employees had attended some of the GWEC customer appreciation golf tournaments and other social events. The interviewing agents reviewed Hamilton’s expense reports with him in great detail. He specifically recalled seeing Leyshon at the “Bear Dance” event in 2005 and admitted that his personal expense reports indicated that she was present at many meals and drinks for which he had paid. Hamilton did not recall Leyshon or any other MMS employee paying for any of his expenses.

## 2. Crystel Edler

Crystel Edler has been employed by MMS since 1989. She was an RIK oil marketing specialist from approximately 2001 until 2007, when she was reassigned to a new position within MRM. While assigned to RIK, Edler worked directly for Stacy Leyshon.

A review of Edler’s training records disclosed that she received ethics training in 1999, 2002, 2003, 2004, and 2006. Edler also periodically received information on DOI ethics rules by e-mail. For example, Edler received an October 2002 e-mail sent to MMS employees nationwide concerning ethics in which the term “gift” was described as “anything of monetary value: gratuities, favors, discounts, hospitality, entertainment, loans, training, lodging, transportation, and meals or refreshments.” While there was no information in the DOI Ethics Office training files documenting Edler’s attendance at ethics training in 2005, we found an acceptance e-mail sent by Edler in response to a mandatory ethics training notice sent to RIK employees. A review of her cash awards from MMS for the period of 2002 through 2006 revealed a total of \$9,750.

Through interviews and a review of oil and gas company expense records and other documentation, we found that between 2002 and 2006, Edler attended numerous events hosted and paid for by industry representatives. For example, we found that Edler attended Shell’s annual customer outings, GWEC’s annual customer appreciation golf tournaments, and Shell’s annual holiday dinner. We also found that she accepted free golf, lodging, snowboarding lessons and rental equipment, and other gifts, mainly in the form of meals and drinks, from numerous oil company representatives.

Specifically, Edler accepted gifts valued at approximately \$2,715 from Chevron, Shell, GWEC, and Hess on at least 61 occasions between 2002 and 2006, as follows:

|              | CHEVRON   |              | SHELL     |                | GWEC     |              | HESS     |              | TOTAL     |                |
|--------------|-----------|--------------|-----------|----------------|----------|--------------|----------|--------------|-----------|----------------|
| Fiscal Year  | Gifts     | Value        | Gifts     | Value          | Gifts    | Value        | Gifts    | Value        | Gifts     | Value          |
| 2002         | 4         | \$69         | 3         | \$257          |          |              | 1        | \$19         | 8         | \$345          |
| 2003         | 16        | \$284        | 3         | \$154          | 3        | \$34         | 4        | \$224        | 26        | \$696          |
| 2004         | 8         | \$106        | 8         | \$573          | 2        | \$318        |          |              | 18        | \$997          |
| 2005         | 3         | \$169        | 2         | \$44           | 3        | \$447        |          |              | 8         | \$660          |
| 2006         |           |              | 1         | \$17           |          |              |          |              | 1         | \$17           |
| <b>Total</b> | <b>31</b> | <b>\$628</b> | <b>17</b> | <b>\$1,045</b> | <b>8</b> | <b>\$799</b> | <b>5</b> | <b>\$243</b> | <b>61</b> | <b>\$2,715</b> |

Our review of Chevron representatives' expense reports disclosed that Edler was listed 31 times between 2002 and 2006. The entries reflected meals and drinks, a customer appreciation dinner, and golf balls purchased for her at the GWEC tournament.

Our review of Shell representatives' expense reports and other documentation disclosed that Edler received approximately 17 gifts between 2002 and 2006. The expense report entries reflected only meals and drinks. Interviews and record reviews disclosed that Edler also attended Shell's customer appreciation dinners and customer appreciation outings, which were not reflected on Shell's document production.

Our review of a GWEC representative's expense reports and other documentation disclosed that Edler received approximately eight gifts between 2002 and 2006. The expense report entries reflected only meals.

In addition, interviews and record reviews disclosed that Edler, like Leyshon, attended the GWEC annual customer appreciation golf tournament in 2004 and 2005. We found an e-mail, dated April 24, 2004, from an official from GWEC requesting Edler's address "for the gift." Edler replied giving her address. In an August 11, 2005 e-mail with the subject line "PGA Golf Tour," Edler was asked which gift she would like, and she responded, "I want to say it was the garment bag," again providing her mailing address.

Our review of a Hess representative's expense reports disclosed that Edler was listed on the reports four times between 2002 and 2003. In addition, interviews disclosed that Edler stayed two nights in lodging provided by Hess at a 2003 Shell event in Steamboat Springs, CO. Edler's stay was not reflected in the Hess expense reports.

In addition, our investigation disclosed that in 2004, Greg Smith became concerned that an RIK employee might have released confidential pipeline transportation rates to Shell. Apparently, a company official from Poseidon Oil had called Smith to complain that Shell had learned of the confidential transportation rate that Poseidon had negotiated with RIK. We also discovered e-mails sent among RIK staff where Edler admitted to talking to "Mike" (Faulise) about the Poseidon deal. On May 6, 2004, Smith sent an e-mail to several RIK marketers including Edler



that stated, "I have heard the details of our agreement with Poseidon ... including the actual rate we agreed to ... was communicated to Shell. If true, this ran counter to our promise to Poseidon to keep this information confidential."

Our investigation also disclosed that Edler failed to request the required approval for her outside employment with A&B Professional Services (A&B), a firm that provides accounting services to interior designers. In addition, Edler failed to report the income she received from A&B in 2004 and 2005 on her Office of Government Ethics Form 450, as required.

We interviewed Wallene Reimer, the owner of A&B and Edler's sister, who stated that Edler had worked for A&B for one year. According to W-2 Forms provided by Reimer, Edler received the following income:

|      | Amount     | Form 450                         |
|------|------------|----------------------------------|
| 2003 | \$82.92    | Did not report (not required to) |
| 2004 | \$515.75   | Did not report                   |
| 2005 | \$1,503.63 | Did not report                   |

We interviewed Edler twice, and both interviews were conducted as a result of a proffer agreement signed between Edler and DOJ. Edler admitted that in some instances, she violated the government ethics rules by accepting gifts from oil company representatives. She stated that it was "really hard for us to stay within the ethics guidelines" because it was common for industry officials to pay for each other's expenses. She also claimed that in some instances, she paid for dinners with her own money. Edler claimed that RIK's goal was to "be a part of industry." She also said, "We wanted to be received as the producers, just like anybody else ... being in the business and going out and meeting with these people and becoming friends with them has gotten me very far with them."

*Agent's Note: We also interviewed Edler during our investigation of false claims allegations raised by MMS auditors in 2006 (Case No. [Exemption 2]). During this interview, investigators asked Edler about any sexual relationships she had with, or gratuities she accepted from, oil company officials. Edler responded, "Absolutely not. I mean no," adding that she had never even heard of this occurring.*

When asked, Edler could not remember how often she dined with Chevron employees, but she did not dispute the information in Chevron's expense reports. She also said she did not document the value of the meals and drinks she accepted. She said she usually tried to order the "cheapest" items on the menu when she dined with Chevron employees and claimed she sometimes purchased meals and drinks for Chevron employees in an effort to reciprocate.

Edler told investigators that she did not document the value of the meals and drinks Shell employees provided her. She said Shell employees always ordered expensive bottles of wine and when she realized how expensive the wine was, she stopped drinking it. Edler claimed that she often reciprocated by buying Shell employees meals and drinks, but she was not able to provide any receipts to substantiate this.

Edler confirmed that she attended the Shell customer appreciation outings in 2002 and 2004. She said she attended these events in order to meet and get to know industry representatives. She said RIK was dependent on industry personnel to provide it with knowledge to be successful, and the RIK Program was enhanced as a result of RIK employees attending these events.

Edler told investigators that during the 2002 event, she golfed with Shell employees but could not recall who paid her fees. She admitted that Shell also provided lodging for her during the 2002 event. She explained that she had originally planned to stay at a condo she had reserved, but the weather turned bad. Advised that the investigation had disclosed that she spent the night at Shell's lodge because she had too much to drink, Edler said, "It could have been that, too. Honestly, I don't recall the reason. It was a long time ago."

Edler stated that she did not reimburse Shell for the cost of her lodging and instead she and Leyshon provided breakfast for the group during the event. She said that since this breakfast food was valued at a few hundred dollars, this was the equivalent to paying Shell for their lodging.

Edler said that although the MMS Ethics Office did not approve their attendance at this event, Smith did, and he was aware that Edler would be golfing with Shell during the day and spending the night. "Anything that we did, Greg knew and approved," Edler said. According to Edler, Smith's approval was verbal and not in writing.

Our investigation revealed that in 2004, Edler attended another Shell appreciation event, which was held during the winter in Keystone, CO, and again Shell provided her lodging. When asked about this event, Edler said she did not want to attend this event, but Smith had ordered her to attend, and she did. According to Edler, Smith knew she would be staying in lodging provided by Shell. She did admit that she went snowboarding and that Shell had paid for her equipment rental and a snowboarding lesson.

Edler did not dispute any of the information in the GWEC expense reports. She remembered dining with Hamilton and a group of RIK employees around Christmas, several times. The only specific meal she recalled attending, when Hamilton had paid, occurred in December 2005 when the RIK employees in attendance went well over the \$20 per occasion limit. She said she never reimbursed Hamilton for any of her expenses, but she may have bought him drinks one time.

Edler said she thought she only attended the GWEC customer appreciation golf tournament one time, in 2004, and added that both Leyshon and Smith were with her. Edler claimed that she did not accept the PGA tournament tickets that were given to all attendees of the GWEC tournament. However, she could not remember if she accepted the free meals GWEC provided or received a gift as part of her attendance at the event. After being advised that she was listed on GWEC records as receiving a golf bag in 2004 and a garment bag in 2005, she stated that if she had received these gifts, she would have donated them to Goodwill or the Salvation Army. Edler said she did not keep receipts for items she donated to charity.

According to Edler, she and a Hess employee often went out socially while in Houston, but Edler said she would be "shocked" if the Hess employee charged these costs to his Hess expense

account. Edler said she and the Hess employee had usually shared expenses. *Agent's Note: The Hess employee's expense reports for 2002 and 2003 indicate a total of approximately \$100 spent on Edler.*

Edler stated that she could not recall ever adjusting her travel voucher to reflect any meals that were provided by industry at any of the events she attended. She said that "looking back," she probably should have adjusted her vouchers, but she was traveling so much she neglected to do so.

Edler said she did not report meals, drinks, or any of the entertainment she received as gifts from industry officials on her OGE 450, Confidential Financial Disclosure Forms, because she did not consider them gifts.

When investigators asked Edler about Smith's e-mail to her and other RIK employees, regarding Poseidon Oil, she denied ever giving anyone in the oil or gas industry any confidential information. Edler explained that the transportation rates were "very transparent" and that a company could simply examine the RIK bid formula and guess what transportation rate Poseidon had received. *Agent's Note: When Leyshon was asked about this incident, she told investigators that the Poseidon matter in question was assigned to Edler. Leyshon said she counseled Edler on the issue but Edler had denied releasing the rate information.*

Edler said she had romantic relationships with two men from the oil industry: One who worked for Shell Pipeline Company and an oil scheduler for Chevron. Edler said her supervisor, Leyshon, knew about both relationships, and Edler did not think there was a reason to recuse herself from dealing with Shell or Chevron. She claimed that she never discussed RIK business with either the Shell employee or the Chevron employee. When asked if she had personal or sexual relationships with anyone else from industry, Edler asked the agents if they had any e-mails or evidence with which to remind her, adding "I did date people."

We reviewed company records and expense reports for Chevron and Shell Pipeline Company and did not find any gifts or meals purchased for Edler by the Shell Pipeline Company or Chevron. *Agent's Note: DOI-OIG agents attempted to interview both the Shell and Chevron employees. The Chevron employee refused to be interviewed and the Shell employee refused repeated attempts to schedule an interview.*

Edler admitted that she had used cocaine "in the past," most recently in 2005. However, she claimed that she never used cocaine during business hours and that she never used cocaine with any MMS employees or industry representatives.

Edler explained that she did not obtain approval for her outside employment with A&B from her supervisor, Stacy Leyshon, but that she may have mentioned it to Leyshon "in passing." She said she did not actually feel the employment needed formal MMS approval because her employer was her sister. Edler claimed that she failed to report her A&B income on her OGE 450 Form because she did not realize that the income amount was high enough to trigger the requirement to report. She also stated that she "probably forgot about it" and that it was "an error" on her part not to report the A&B income.

Investigators asked Edler about allegations that she had allowed Chevron employee Jeff Brough to amend a bid. She explained that Brough, who was new to the RIK Program, had bid on a large number of barrels and won. She said she thought this was his first bid submission to RIK. Edler continued by stating that a month later, Brough was “freaking out” because he had left out “something” (she could not recall what he left out) on his bid. According to Edler, Brough traveled to Denver to meet with Smith and discuss his error. Edler recalled that Smith said RIK would split the cost of the amendment with Brough. She added that RIK was not trying to “screw anybody over.” She said RIK employees probably “joked” about saving Brough’s job, but she did believe his job was at risk.

Edler explained that she did not provide Brough with the amendment in return for any favors. She further stated that in regard to amendments, there was no decision-making on her part and that she had to pass all company amendment requests on to Leyshon and that Smith or Pam Rieger had to approve the amendment before forwarding it to the contracting officer for concurrence.

Finally, Edler insisted that no one in industry ever offered her anything in exchange for favorable treatment. She also claimed that the gifts she received from industry officials never influenced her work at RIK.

We interviewed Mike Faulise, Barbara Layer, and Alan Raymond of Shell, who all confirmed that Edler was an RIK employee they dealt with on both a professional and social basis. Both Faulise and Layer remembered her attending the annual Shell outings. During Faulise’s interview, we showed him a February 2004 e-mail he wrote to Edler stating, “Nobody will say anything about you being here for the night. As far as I’m concerned, you were in a hotel.” Edler responded, “Mikey ... you are sooo wonderful. You know how much I totally adore you.” Faulise said Edler had informed him that Smith did not approve of her staying in Shell-provided lodging. Faulise said he could not recall Edler ever paying for her lodging or meals at Shell-sponsored events.

Faulise also recalled a discussion with Edler where they discussed RIK shipping Poseidon oil on a Poseidon-owned pipeline. Faulise was upset about MMS shipping on this pipeline because Shell had a difficult time shipping its own barrels on the same pipeline. Faulise stated that Edler may have given him the specific rate that RIK gave Poseidon, but he could not recall for certain if she did. However, he did recall complaining about the matter to a Poseidon employee, who then expressed irritation that Edler had talked to Shell about an RIK-Poseidon deal.

Layer opined that Leyshon and Edler “couldn’t have done their job as well” had they not attended industry sponsored events. She recalled telling both Edler and Leyshon that “My lips are sealed” when it became known that they were not authorized to accept lodging from Shell. She specifically remembered seeing Edler at Shell’s holiday parties in New Orleans where all attendees received gifts.

Finally, Layer informed us that she had witnessed Edler making advances on a male industry executive at one of Shell’s holiday parties. [Exemptions 6 & 7(C)]

Raymond remembered one social event where he said Edler had had too much to drink and had acted "too friendly" in public with him. He opined that Edler was "definitely not professional." He also recalled buying her several meals and drinks along with other RIK employees.

When we interviewed Don Hamilton from GWEC, he identified Edler as somebody he dealt with professionally and socially. He recalled numerous occasions where he bought Edler drinks and meals and specifically remembered her attendance at the 2005 GWEC golf event at Bear Dance and having seen her RSVPs for other GWEC-sponsored events. Hamilton denied offering Edler or any other RIK employee gifts in exchange for preferential treatment.

He offered the following philosophy about RIK employees attending industry events: "[Y]ou cannot market oil and get top dollar sitting in an ivory tower."

We interviewed the Hess employee who provided gifts to Edler. He stated that he purchased meals and drinks for Edler on four separate occasions and charged them to his Hess expense account. The total expense for Edler was approximately \$119. He stated that Edler never reimbursed him for any of these expenses.

### 3. Richard Fantel

Richard Fantel has been employed by MMS since 1997. He was an RIK oil marketing specialist from 2002 through December 2006, when he was detailed to a new position within MMS. While in the RIK Program, he was a direct report to Stacy Leyshon. Fantel was employed by the Bureau of Mines, DOI, between 1978 and 1996. He is a geologist by education and training.

A review of Fantel's training records disclosed that he received ethics training in 1999, 2000, 2001, 2002, 2003, 2004, and 2006. While we did not find any information in the MMS Ethics Office training files documenting Fantel's attendance at ethics training in 2005, the e-mail notice regarding the mandatory EEO/Ethics training presented by the Western Administrative Service Center was sent to Fantel. A review of Fantel's cash awards from MMS for the period of 2002 through 2006 revealed a total of \$7,000.

Through interviews and a review of oil and gas company expense records, we found that Fantel accepted gifts valued at approximately \$333 from Chevron, Shell, and GWEC on at least 16 occasions between 2002 and 2006, as follows:

| Discal<br>Year | CHEVRON  |              | SHELL    |              | GWEC     |             | TOTAL     |              |
|----------------|----------|--------------|----------|--------------|----------|-------------|-----------|--------------|
|                | Gifts    | Value        | Gifts    | Value        | Gifts    | Value       | Gifts     | Value        |
| 2002           | 1        | \$20         |          |              |          |             | 1         | \$20         |
| 2003           | 3        | \$41         | 1        | \$12         |          |             | 4         | \$53         |
| 2004           | 2        | \$24         | 3        | \$106        |          |             | 5         | \$130        |
| 2005           | 2        | \$46         | 1        | \$6          | 1        | \$55        | 4         | \$107        |
| 2006           |          |              | 2        | \$23         |          |             | 2         | \$23         |
| <b>Total</b>   | <b>8</b> | <b>\$131</b> | <b>7</b> | <b>\$147</b> | <b>1</b> | <b>\$55</b> | <b>16</b> | <b>\$333</b> |

Our review of Chevron representatives' expense reports disclosed that Fantel was listed eight times between 2002 and 2006. All of the entries reflected meals and drinks.

Our review of Shell representatives' expense reports disclosed that Fantel was listed seven times between 2002 and 2006. All of the entries reflected meals and drinks. Interviews and record reviews also disclosed that Fantel also attended two Shell-sponsored holiday parties in New Orleans where gifts were normally given to all attendees.

Our review of GWEC's records revealed one gift valued at \$55 in 2005, and further investigation revealed it was a holiday meal in Denver.

However, we also discovered that Fantel was operating a consulting company called Sundarbans. Sundarbans' Web site lists Fantel, as well as MMS employee Gary Peterson, as employees. Fantel had posted his resume on the site, which identifies him as an MMS employee.

A review of Fantel's OGE Form 450s showed that he never reported his employment with, or income from, Sundarbans to MMS. However, we did find that he reported holding outside employment one year (1997) with Pincok, Allen, and Holt (PAH), a mineral consulting firm with offices in Lakewood, CO.

A further review of Fantel's tax returns disclosed that in 2005, Fantel received a \$4,000 prize from the management company of the Colorado Rockies baseball team. Fantel did not report the prize income on his OGE 450 for that year as required.

In sum, Fantel received outside income on three occasions, as follows:

| Year | Source of Income | Gross Amount | Findings                    |
|------|------------------|--------------|-----------------------------|
| 1997 | PAH              | \$9,225      | OGE 450 routinely destroyed |
| 2000 | PAH              | \$500        | Not reported on OGE 450     |
| 2005 | Colorado Rockies | \$4,000      | Not reported on OGE 450     |

We interviewed Fantel on four separate occasions. When interviewed, Fantel confirmed that he received annual ethics training and that he was aware of the gift thresholds. He said, "It's not an exact science...I try the best I can to stay within those limits....It's so different in the kind of job I have, than other people in the federal government. Does it count that I pick up the tab sometimes? I don't know."

He went on to say that Leyshon had told him that there would be situations where marketers would have to let oil executives pay for meals but to aim for the lower-priced items on the menu. He did not deny exceeding the gift limits but claimed that if he had, it was only by a few dollars. Fantel felt that because he sometimes paid for oil executives' meals and drinks with his own credit card, it all balanced out.

Fantel described many of his contacts in the oil and gas industry as personal friends with whom he shared interests like fantasy football. He specifically mentioned two Chevron representatives

and four Shell employees, including Alan Raymond, as falling into the category of being both personal and professional acquaintances. Fantel said "almost everyone" in the oil industry prefers RIK to RIV because "There is definitely an advantage to the industry, so that they wouldn't have to be subject to audit."

While Fantel freely admitted that he had received meals from industry representatives, he also said he had returned gifts to companies on several occasions and declined gifts because he felt they were too expensive. He provided the examples of turning down a ticket for a Houston Astros baseball game in the summer of 2006 as a gift he refused from a Shell employee and returning a gift of a silver-plated dish to Barbara Layer that she had sent him. Fantel also said he never shared confidential or proprietary information with oil companies, and he had not heard of anyone in RIK ever doing so.

Fantel recalled attending an industry conference in Scottsdale, AZ, within the last 3 years where he received a "treasure hunt" tour in the desert, paid for by BP Pipeline Company (BP). He said he did not have a problem with BP paying for this trip and associated expenses because RIK spent several hundred thousand dollars each year to use BP pipeline infrastructure. He opined that because of RIK's use of the BP pipeline, they (RIK) were, in essence, paying for the event. Fantel said that, in hindsight, he should not have gone on this trip. *Agent's Note: We researched desert tours on the Internet and estimated that the price per individual for this desert tour was \$100.*

Further, Fantel told us that Leyshon told RIK marketers not to discuss the events of their work/travel with people outside of RIK. Fantel said this was important because, "we all felt, and I know that this came down from management....Look we're a unique kind of situation in MMS, and there's a lot of people in the building that just wouldn't understand the situations we're put under. So it's better not to talk about these things." Asked why it would be a problem for non-RIK employees to learn about marketers getting meals and drinks from oil representatives, Fantel responded, with a slight chuckle, "They might have, you know, contacted the IG [Inspector General]."

Fantel also told investigators that he wished RIK marketers could receive exceptions from the ethical guidelines because of the nature of their work. He said, "We're kind of in an awkward position sometimes....It's very awkward for us to say I have to pay my own. And that's one of the problems."

When asked about Sundarbans, Fantel stated that he never discussed any aspect of Sundarbans with the MMS Ethics Office because he did not think he needed to. He admitted that he had posted his MMS title on the Sundarbans' Web site as part of his resume. *Agent's Note: When we interviewed Donna Huston, Ethics Advisor, MMS, she stated that by posting his resume identifying his MMS employment on the Sundarbans Web site, Fantel had violated ethics rules that prohibit an employee from using his/her government position for private gain.*

According to Fantel, he only made money from Sundarbans twice. In 1997, PAH paid him \$9,225 for work he performed on a study involving a phosphate deposit project in Peru. In 2000, a lawyer who was involved in the *Cobell v. Kempthorne* litigation contacted Fantel to perform

some work. Fantel said he referred the lawyer to PAH, who in turn paid Fantel a \$500 referral fee. He also told us that MMS employee Gary Peterson, whose resume was also posted on his Web site, had received monies for writing a chapter of a mining book and had given him a referral fee for \$100 or less. Fantel claimed that he considered Sundarbans to be a "hobby" and that he actually lost money on it because of the Internet service fees.

Fantel also told us that in 2004, the Colorado Rockies baseball organization held a drawing of season ticket holders and awarded the winner a prize package worth \$4,000 consisting of three nights at a lodge at Lake Powell, UT. Fantel stated that he had won the drawing but had not reported the prize on his OGE 450 Form, as required.

When we interviewed Barbara Layer of Shell, she recalled that she took several RIK employees to lunch in February 2003 and she thought Fantel was present. Her records reflect that this lunch cost \$234.

When we interviewed Don Hamilton of GWEC, he recalled that he and another GWEC executive took Fantel and two or three other RIK employees to lunch in Denver around the 2005 holiday season. Hamilton stated that he paid for the entire meal but did not know each individual's portion, although the total expense for the lunch was \$332.95. He also said that while his records indicated that Fantel attended the GWEC-sponsored golf tournament in 2006, he did not remember him being present.

#### **4. Gary Peterson**

Gary Peterson is a minerals revenue specialist and has been employed by MMS since 1997. From 1989 until 1996, Peterson worked for the Bureau of Mines. As noted above, Peterson's resume was posted on Fantel's Sundarbans Web site.

When we interviewed Donna Huston, the MMS Ethics Advisor, she stated that by posting his resume on the Sundarbans' Web site, Peterson had violated the ethics rules that prohibit an employee from using his/her government position for private gain.

While Peterson's resume and photo appeared on the Sundarbans Web site and his resume listed his MMS employment, Peterson said he never worked for Sundarbans or Fantel. Instead, he said the Web site was a tool to promote Peterson and Fantel's resumes and minerals expertise backgrounds. Peterson said he never discussed his affiliation with Sundarbans with the MMS Ethics Office because he never officially worked for Sundarbans.

Regarding a \$1,500 check, dated April 19, 2001, that Peterson received from an outside source, Peterson explained that he had performed a study of the steel and chromium markets for the outside source and had been paid \$1,500 for his work. Peterson claimed that this work was unrelated to any MMS or DOI work. However, he admitted that he had failed to seek outside employment approval or report this income on his OGE 450.



In 1997, Peterson requested and received authorization from the MMS Ethics Office to conduct outside work for two minerals companies: JME Company and Steffen, Roberson, and Kirsten (SRK), both located in the Denver area.

Peterson voluntarily provided his IRS MISC-1099 report from SRK in 2003, which showed he received \$960. Peterson admitted that he had failed to report this \$960 on his 2003 OGE 450 and that he deserved to be "slapped" for neglecting to report it.

When we interviewed SRK and JME company officials, they both confirmed that Peterson performed work for them. SRK indicated that Peterson performed work for them in 1997, 1998, and 2003. In addition to the \$960 he received from them in 2003, he also received a total of \$7,560 in 1997 and 1998. JME records reflect \$2,300 being paid to Peterson from 1997 and 1998. Both officials said their companies did not perform any oil- or gas-related work for DOI.

*Agent's Note: Since OGE 450s are routinely destroyed after 6 years by MMS, we were unable to find Peterson's official OGE 450 to see whether or not this income was reported as required. However, when we interviewed Peterson on these matters, he provided us with copies of his OGE 450 Forms for 1997 and 1998. On the forms, he had reported his income from SRK and JME in Part III, "Outside Positions." He did not, however, report these companies as sources of income in Part I, "Assets and Income." Peterson told us that not reporting these sources of income in Part I was an oversight on his part, for which he apologized. He told us he did not realize that he needed to report the employment in Part I and noted that the forms were reviewed by the MMS Ethics Office, and no one noticed the discrepancy. He further stated that in 1997 and 1998, he did not receive any training on how to fill out the Office of Government Ethics Form 450.*

##### 5. Allen Vigil

Allen Vigil, an RIK oil marketing specialist, has been employed by MMS since approximately 1992 and has been working in the RIK Division since October 2000.

A review of ethics training files disclosed that Vigil received ethics training in 1999, 2001, 2003, and 2006. A review of Vigil's cash awards from MMS for 2002 through 2006 revealed a total of \$7,800.

Through interviews and a review of oil and gas company expense records, we found that between 2003 and 2006, Vigil accepted 17 meals/drinks valued at a total of approximately \$343. These meals were paid for by industry representatives, as follows:

|              | CHEVRON   |               | SHELL    |              | TOTAL     |               |
|--------------|-----------|---------------|----------|--------------|-----------|---------------|
| Year         | Gifts     | Value         | Gifts    | Value        | Gifts     | Value         |
| 2002         | 1         | \$ 40         |          |              | 1         | \$ 40         |
| 2003         | 5         | \$ 108        |          |              | 5         | \$ 108        |
| 2004         | 5         | \$ 73         | 1        | \$ 16        | 6         | \$ 89         |
| 2005         | 4         | \$ 90         | 1        | \$ 16        | 5         | \$ 106        |
| 2006         |           |               |          |              |           |               |
| <b>Total</b> | <b>15</b> | <b>\$ 311</b> | <b>2</b> | <b>\$ 32</b> | <b>17</b> | <b>\$ 343</b> |

Our review of Chevron representatives' expense reports disclosed that Vigil was listed 15 times between 2003 and 2006. The entries reflected meals and drinks only.

Our review of Shell representatives' expense reports disclosed that Vigil was listed two times between 2004 and 2006. The entries reflected meals only.

When interviewed, Vigil told investigators that while he did accept meals, he did not attend any industry-sponsored holiday parties or skiing events. He admitted being present at the two meals listed on Shell's expense reports. Vigil essentially said he had never been asked by oil company officials for confidential RIK information, and he was not aware of any other RIK employees providing, or being asked by oil company officials to provide, confidential business information.

He admitted that he likely violated the \$50 per annum gift threshold in 2003 and the \$20 per occasion gift threshold in 2005. However, there were three entries on Chevron's expense reports for which Vigil denied being present.

We interviewed Alan Raymond of Shell regarding Vigil. A review of his expense reports indicated that on October 20, 2005, he bought dinner and drinks for Vigil and two other RIK employees for a total of \$79.60.

When we interviewed the employee from Hess, he said his expense account reflected that Vigil was present with other RIK and industry employees during a social event at the Flying Saucer Restaurant in Houston on September 9, 2003. His expense was listed as \$57.55.

#### 6. Donna Hogan

Donna Hogan, an RIK oil marketing specialist, has been employed by MMS since 1989. She has worked in the RIK Division since 2003.

A review of ethics training files disclosed that Hogan received ethics training in 2003, 2004, and 2006. A review of Hogan's cash awards from MMS for 2002 through 2006 revealed a total of \$7,869.

Through interviews and a review of oil and gas company expense records, we found that between 2004 and 2006, Hogan accepted 13 meals valued at approximately \$249. Industry representatives paid for these meals, as follows:

| Hogan Year   | CHEVRON  |              | GWEC     |             | SHELL    |             | TOTAL     |              |
|--------------|----------|--------------|----------|-------------|----------|-------------|-----------|--------------|
|              | Gifts    | Value        | Gifts    | Value       | Gifts    | Value       | Gifts     | Value        |
| 2004         | 6        | \$99         |          |             | 1        | \$16        | 7         | \$115        |
| 2005         | 3        | \$50         | 1        | \$55        | 1        | \$16        | 5         | \$121        |
| 2006         |          |              | 1        | \$13        |          |             | 1         | \$13         |
| <b>Total</b> | <b>9</b> | <b>\$149</b> | <b>2</b> | <b>\$68</b> | <b>2</b> | <b>\$32</b> | <b>13</b> | <b>\$249</b> |

Our review of Chevron representatives' expense reports disclosed that Hogan was listed nine times between 2004 and 2006. The entries reflected meals and drinks only.

Our review of GWEC representatives' expense reports disclosed that Hogan was listed on the reports two times in 2006. These entries reflected meals only.

Our review of Shell representatives' expense reports disclosed that Hogan was listed two times between 2004 and 2006. The entries reflected meals.

Our investigation also disclosed that Hogan received a ticket to a country music concert by Toby Keith from Burlington Resources. *Agent's Note: We were able to determine that the ticket price range of this concert was \$26 to \$5,885.*

Hogan told investigators that she did not attend any industry-sponsored holiday parties or ski outings. She said she would pay for her share of meals and reimburse oil company employees who paid the total bill with a corporate credit card. She said she may not have followed ethics rules on occasion but never exceeded the \$20 and \$50 gift limits by more than a few dollars. Hogan disputed the average amounts assigned in the expense chart, saying she would never eat expensive meals while on travel or at work functions. She claimed, "I don't feel like I have gone out blatantly and been [lavished] by the companies." Hogan specifically denied that she violated any ethics rules in either 2006 or 2007.

When questioned about the concert ticket, Hogan stated that it was given to her at no charge and that she assumed the ticket had been purchased by Burlington Resources. She told the interviewing agents, "I didn't really think about it."

Don Hamilton from GWEC confirmed that his expense reports showed that he bought two meals for Hogan in 2006 for a total of \$68.

Alan Raymond from Shell recalled buying Hogan dinner and drinks in Houston on October 20, 2005, along with several other RIK employees. His expense report showed a \$79.60 charge.

#### 7. Lawrence Cobb

Lawrence Cobb, RIK's credit manager, has been employed by MMS since 1983. He has been assigned to the RIK Division since 2000.

A review of ethics training files disclosed that Cobb received ethics training in 2001, 2004, and 2006. A review of Cobb's cash awards from MMS for 2002 through 2006 revealed a total of \$9,128.

Through interviews and a review of oil and gas company expense records, we found that between 2004 and 2006, Cobb accepted nine meals/drinks valued at approximately \$236. These meals/drinks were paid for by industry representatives, as follows:

| Fiscal Year  | CHEVRON  |             | GWEC     |              | TOTAL    |              |
|--------------|----------|-------------|----------|--------------|----------|--------------|
|              | Gifts    | Value       | Gifts    | Value        | Gifts    | Value        |
| 2004         | 4        | \$30        |          |              | 4        | \$30         |
| 2005         |          |             | 2        | \$42         | 2        | \$42         |
| 2006         |          |             | 3        | \$164        | 3        | \$164        |
| <b>Total</b> | <b>4</b> | <b>\$30</b> | <b>5</b> | <b>\$206</b> | <b>9</b> | <b>\$236</b> |

Our review of Chevron representatives' expense reports disclosed that Cobb was listed four times, all on 1 day, at Jillians, a restaurant in Denver. Our review of GWEC representatives' expense reports disclosed that Cobb was listed five times, all for meals.

When interviewed, Cobb admitted frequent social contacts with Rob Saunders of GWEC. He also did not dispute the accuracy of Saunders' expense account noted above and further said, "No, it's probably a violation on my part." Cobb said Saunders never asked for him to execute any official act because of the meals, and Cobb never offered anything in exchange for receiving the meals.

Cobb said he remembered being at Jillians with the Chevron representatives and remembered them buying him a couple of drinks. He said the Chevron representatives may have also ordered themselves food.

We interviewed Rob Saunders, Assistant Treasurer, GWEC. As treasurer, Saunders said he dealt with credit and securities issues for GWEC and said his main contact at RIK was Cobb. He confirmed that he purchased meals for Cobb and estimated Cobb's portion as identified in the expense table above.

Saunders stated that he routinely took individuals to dinner from companies that GWEC bought crude oil from to build rapport. By building rapport, Saunders said he felt the individuals were more comfortable assigning open credit to GWEC in conjunction with the oil that GWEC purchased. He said meal purchases were merely a way to say GWEC appreciated doing business with companies. Saunders said on one or two occasions, Cobb may have purchased meals valued at approximately \$10 for him.

### 8. Karen Krock

Karen Krock, a former RIK oil marketing specialist, has been employed by MMS since 2000. She worked as an RIK oil marketing specialist from 2002 through 2004; then she moved to MMS's Offshore Minerals Management Office in New Orleans as a management analyst.

A review of ethics training files disclosed that Krock received ethics training in 2000, 2002, 2003, and 2006. There were no cash awards from MMS given to Krock from 2002 through 2004.

Through interviews and a review of oil and gas company expense records, we found that during 2003 and 2004, Krock accepted 10 meals/drinks valued at approximately \$198. These meals/drinks were paid for by industry representatives, as follows:

| Meal year    | Chevron  |              | Shell    |             | Total     |              |
|--------------|----------|--------------|----------|-------------|-----------|--------------|
|              | Gifts    | Value        | Gifts    | Value       | Gifts     | Value        |
| 2003         | 7        | \$121        | 2        | \$27        | 9         | \$148        |
| 2004         | 1        | \$50         |          |             | 1         | \$50         |
| <b>Total</b> | <b>8</b> | <b>\$171</b> | <b>2</b> | <b>\$27</b> | <b>10</b> | <b>\$198</b> |

When interviewed, Krock either did not recall these meals or she claimed the amounts were too high. Even after reviewing the individual entries on the company expense reports for both Chevron and Shell, she continued to claim that she never violated government gift limits when dining with industry employees. Krock did recall receiving a free ticket to a Colorado Rockies game, which she thought Chevron bought for her. She could not recall when that game took place.

When we interviewed Shell's Alan Raymond, he had a vague recollection of buying Krock and Edler dinner in Houston on January 9, 2003, as reflected on his expense report.

### 9. RIK Revenue Specialist

An RIK revenue specialist originally began working for MMS in 1990 as an auditor. In June 2002, he became a revenue specialist in the RIK Program.

A review of ethics training files disclosed that the revenue specialist received ethics training in 2002, 2003, and 2006.

Through interviews and a review of oil and gas company expense records, we found that in 2004, the revenue specialist was listed on Chevron's expense reports three times. Two were related to a paintball game and the third was at a restaurant, all of which occurred the same day. The total estimated value of the revenue specialist's share of these expenses was approximately \$90, as follows:

| Fiscal Year | CHEVRON |       |
|-------------|---------|-------|
|             | Gifts   | Value |
| 2004        | 3       | \$90  |
| Total       | 3       | \$90  |

When interviewed, the revenue specialist recalled playing in a paintball game with Leyshon and Chevron employees. According to the revenue specialist, Leyshon invited him to the outing and he met the other participants at the paintball game location.

The revenue specialist said he did not know how much it cost for him to play paintball and he did not know who paid for his participation. He was not concerned that Chevron might have paid for his participation or that it might be considered a gift.

The revenue specialist said that if he and Leyshon had discussed the cost of the paintball, Leyshon probably told him not to worry about it or that she would pay. The revenue specialist stated that after the paintball game, the group met at a restaurant for appetizers.

### **DISPOSITION**

This report is being referred to the Assistant Secretary for Land and Minerals for whatever action he deems appropriate.



**Office of Public Affairs**  
For Immediate Release  
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**News Media Contact:**  
Patrick Etchart, 303-231-3162

**Interior's ONRR collects \$25 million  
to resolve claims Shell Offshore underpaid royalties**

**DENVER** – The Department of the Interior's Office of Natural Resources Revenue (ONRR) collected \$25 million from Shell Offshore Inc. in a settlement to resolve claims that the company underpaid royalties owed on oil and gas produced from federal leases.

"This resolution demonstrates ONRR's commitment to pursue all revenues due from energy production that occurs on federal onshore and offshore lands," said Greg Gould, Acting Deputy Assistant Secretary for Natural Resources Revenue in the DOI's Office of Policy, Management and Budget.

The settlement agreement covers both royalty-in-value and royalty-in-kind production from Shell deepwater leases located in the Gulf of Mexico. Under the agreement, Shell Offshore paid \$25 million to resolve various oil and gas valuation issues.

The agreement covers the period from Sept. 1, 2000, to Dec. 31, 2008, for oil and July 1, 2000, to Dec. 31, 2008, for gas.

ONRR's Audit and Compliance Management team discovered the various valuation issues while conducting audits of Shell Offshore's leases.

According to Gould, "This settlement further demonstrates that ONRR's audit program is working diligently to collect every dollar due from energy companies operating on federal leases."

The Office of Natural Resources Revenue, under the Assistant Secretary for Policy, Management and Budget, is responsible for collecting and disbursing revenues from energy production that occurs onshore on Federal and American Indian lands and offshore on the Outer Continental Shelf. ONRR makes disbursements on a monthly basis from royalties, rents and bonuses it collects from mineral companies.

-- ONRR --

## Trump's pick for a top Interior post has sued the agency on behalf of powerful California water interests



Bettina Boxall Contact Reporter

When President Trump nominated David Bernhardt for the No. 2 spot at the Interior Department, the administration cited his extensive expertise.

What the announcement failed to mention was that much of that experience was lobbying and doing legal work to elude or undermine Interior Department policies and protections.

As a partner in one of the nation's top-grossing lobbying law firms, Bernhardt has represented major players in oil, mining and western water — all areas that fall under the purview of Interior agencies that Bernhardt would oversee if confirmed as the department's deputy secretary.

Bernhardt's firm, Brownstein Hyatt Farber Schreck, has sued Interior four times on behalf of Westlands Water District, the nation's largest irrigation district. Bernhardt personally argued one appeals case challenging endangered species protections for imperiled California salmon.

Since 2010, Brownstein Hyatt has collected \$2.75 million in lobbying fees from Cadiz Inc., a private company that wants to build a water pipeline on a railroad right-of-way that crosses federal land managed by an Interior agency. Bernhardt has done legal work for Cadiz and one of his colleagues is the chief executive of Cadiz, which has paid the law firm partly with stock shares.



The web of potential conflicts of interest is likely to be a major focus of Bernhardt's confirmation hearing Thursday before the Senate Committee on Energy and Natural Resources.

The committee's top Democrat, Sen. Maria Cantwell of Washington, last week sent Bernhardt a letter asking for more details on his work for clients who probably will have continued dealings with Interior agencies.

Trump's ethics order bars executive branch appointees for two years from getting involved in matters on which they lobbied.

In a May 1 letter to Interior's ethics officer, Bernhardt wrote that if confirmed, he will "withdraw" from his law partnership. He said he would recuse himself from client-related matters for one year — "unless I am first authorized to participate" in them.

Environmentalists argue that Bernhardt would have to remove himself from so many important issues facing Interior that he would be unable to do his job — or, in the alternative, will receive administration waivers to deal with them despite his history of representing department adversaries.

"The idea that Mr. Bernhardt would recuse himself from a long list of all the major issues that Interior faces in California is just not credible," said Barry Nelson, policy representative of the Golden Gate Salmon Assn., which has fought Westlands over fish protections.

Bernhardt's nomination in some ways echoes other Trump picks.

Scott Pruitt, head of the Environmental Protection Agency, sued the EPA multiple times while he was Oklahoma's attorney general. Energy Secretary Rick Perry once vowed to abolish the department he now heads.

If the full Senate approves Bernhardt's nomination, it will mark the second time he has moved through Washington's revolving doors.

Bernhardt went to work as a Brownstein Hyatt associate in 1998 and left the firm in 2001 for a series of posts at Interior under President George W. Bush.

He rose to the position of Interior solicitor, the department's top lawyer, and rejoined Brownstein Hyatt after Obama was elected.

The firm's website, along with ethics filings required of nominees, shows that Bernhardt and Brownstein Hyatt have performed legal services or lobbied for clients that have dealings with virtually every branch of Interior.

Among those clients are:

- Cobalt International Energy, which holds major oil and gas leases in the Gulf of Mexico
- Rosemont Copper Co., which wants to develop a large open-pit copper mine in Arizona
- The Navajo Nation, which has been involved in water rights settlements
- The Independent Petroleum Assn. of America, which represents oil and gas producers.

Until his recent resignation, Bernhardt also served on the board of the Center for Environmental Science Accuracy and Reliability, a California organization that has challenged listings under the Endangered Species Act.

In a May 8 letter to the Senate energy committee, Interior ethics official Melinda Loftin said that after reviewing Bernhardt's financial disclosure report and his ethics agreement, she was satisfied that he would comply with the department's conflict-of-interest rules.

Democrats disagree.

"Bernhardt's [client] representation covers a range of special interests that are constantly doing business with the Department of Interior seeking approvals and engaged in regulatory relationships with the department," said Rep. Jared Huffman (D-San Rafael). "It would be hard to find anyone in the United States that is more conflicted and disqualified for this job than Mr. Bernhardt."

In her letter, Cantwell asked Bernhardt if he played any role in a recent decision that eased the way for Cadiz's potentially lucrative groundwater project.

In late March, an acting assistant director of the U.S. Bureau of Land Management revoked two legal guidances that underpinned the agency's 2015 decision that Cadiz could not use an existing federal railroad right-of-way for a new water pipeline.

That decision threw a huge roadblock in the company's plans to pump groundwater from beneath its desert holdings and sell the supplies to Southern California communities.

Cantwell asked Bernhardt if he served on Trump's Interior transition team and whether he discussed the Cadiz project with the team, the Trump administration or Interior staff. She also wondered whether Bernhardt's payout when he leaves the law firm would reflect any compensation from Cadiz.

According to Cadiz filings with the Securities and Exchange Commission, the company has issued 200,000 shares of common stock to the Brownstein firm and could award another 200,000 shares if the project is built.

Bernhardt was registered as a Westlands lobbyist from 2011 through late 2016, during which time Westlands paid his firm nearly \$1.4 million in fees.

Bernhardt lobbied Congress and Interior on the terms of a settlement of a long-standing legal fight over toxic irrigation drainage in the Westlands district. The agreement — approved by the Obama administration and now pending before Congress — turned out to be far more favorable to Westlands than originally proposed by Interior.

"Bernhardt's extensive experience serving under Secretary [Gale] Norton and his legal career is exactly what is needed to help streamline government and make the Interior and our public lands work for the American economy," Interior Secretary Ryan Zinke said in a statement.

## DAVID BERNHARDT CLIENT LIST

| Company   | Industry and/or Issue Area                          |
|---|---|
| Brownstein Hyatt Farber and Schreck                 | Legal Services                                      |
|   | <b>Offshore (BOEM/BSEE)</b>                         |
| Cobalt International Energy                         | Energy/Natural Resources                            |
| Access Industries                                   | Energy/Natural Resources                            |
| Statoil Gulf Services, Statoil                      | Energy/Natural Resources                            |
| Coastal Point Energy                                | Energy/Natural Resources                            |
| Taylor Energy Company                               | Energy/Natural Resources                            |
| Independent Petroleum Association of America        | Energy/Natural Resources                            |
| National Ocean Industries Association               | Energy/Natural Resources                            |
| Alcatel-Lucent Submarine Networks, Alcatel-Lucent   | Natural Resources                                   |
|   | <b>Onshore (BLM)</b>                                |
| Targa Resources Company                             | Energy/Natural Resources                            |
| NRG Energy  | Energy  |
| Noble Energy Company                                | Energy/Natural Resources                            |
| Sempra Energy                                       | Energy/Natural Resources                            |
| Independent Petroleum Association of America        | Energy/Natural Resources                            |
| Samson Resources Company, KKR                       | Energy/Natural Resources                            |
| Strata Production Company                           | Energy  |
| Statoil Gulf Services, Statoil                      | Energy/Natural Resources                            |
| Halliburton Energy Services, Halliburton            | Energy/Natural Resources                            |
| American Wind Energy Association                    | Energy  |
| Freeport LNG Development                            | Energy  |
| Diamond Ventures                                    | Natural Resources                                   |
| Kingman Farms Ventures                              | Natural Resources                                   |
|   | <b>Mining &amp; Coal (BLM/OSMRE)</b>                |
| Rosemont Copper Company, Hudbay Minerals            | Natural Resources                                   |
| EP Energy, Access Industries                        | Energy/Natural Resources                            |
| Lafarge North America, Lafarge                      | Building Materials                                  |
| American West Potash LLC, Prospect Global Resources | Natural Resources                                   |
| Satya Mineral Trading USA, LLC                      | Natural Resources                                   |
| Ur Energy USA, Ur Energy Inc.                       | Natural Resources                                   |
|   | <b>Arctic/ANWR (FWS/USGS)</b>                       |
| State of Alaska                                     | Energy/Natural Resources                            |
|   | <b>ESA &amp; Outdoor Recreation (FWS/USGS/USES)</b> |
| Safari Club International                           | Outdoor Recreation                                  |

**DAVID BERNHARDT CLIENT LIST**

|  |  |
|--|--|
| Active Network, Vista Equity Partners  | Outdoor Recreation   |
| Vail Resorts Management Company        | Natural Resources  |
|  | <b>Water Management (BOR/EWS)</b>                                    |
| Garrison Diversion Irrigation District | Natural Resources  |
| Westlands Water District               | Natural Resources  |
| Otay Water District                    | Natural Resources  |
|  | <b>Water &amp; Public Lands (NPS)</b>                                |
| Cadiz Inc                              | Natural Resources  |
|  | <b>Tribal Acknowledgement/Land into Trust/Gaming (ASIA/BIA/NIGC)</b> |
| American Gaming Association            | Gaming   |
| Blackfeet Tribe                        | Tribal   |
| Caesars Entertainment                  | Gaming   |
| Navajo Nation                          | Tribal   |
| Forest County Potawatomi Community     | Tribal   |
|  | <b>Tribal Trust/Cobell (ASIA/OST)</b>                                |
|  | <b>Insular Areas (OIA)</b>   |
|  | <b>Miscellaneous</b>   |
| First Wind Energy, SunEdison           | Tax  |
| Association of American Publishers     | Education/Budget   |
| DLJ Real Estate Capital Partners       | Real Estate  |
| Archer Daniels Midland Company         | Food Processing  |

Senator DUCKWORTH. Clearly no candidate is perfect; however, what is so shocking about your candidacy, Mr. Bernhardt, is that the scandal and controversies associated with your career stretch over such a long period of time.

President Trump promised the American people that he would drain the swamp when he was elected, his words, not mine. Yet he weakened the laws that actually prevent the very type of conflict of interest your candidacy is plagued with.

Mr. Bernhardt, a simple yes or no. Are you aware that under the Obama Administration's lobby rules you would not have qualified for this appointment?

Mr. BERNHARDT. Yes.

Senator DUCKWORTH. Okay, thank you.

I would like to yield the rest of my time, Madam Chair, to the Senator from Minnesota, Mr. Franken.

The CHAIRMAN. The Senator has one minute.

Senator FRANKEN. Okay, well I will do a 1 minute and 16 second thing.

I got a call today from a friend in Indian Country, and she expressed a lot of concern from tribal leaders that even though Secretary Zinke assured me that he took tribal consultation sovereignty very seriously that they feel that is not happening. They feel that they are being blocked by James Cason. Do you know who he is?

Mr. BERNHARDT. I do.

Senator FRANKEN. I do want your commitment that you will observe the government relationships with the tribes and undertake meaningful consultation regarding policy and regulatory changes and that you will make that commitment and that you will continue to check in with us to make sure that that is happening?

Mr. BERNHARDT. So, I will unequivocally commit. I will commit to consult. I will unequivocally commit to keeping you updated.

And you don't need to take my word for it, the Southern Ute Tribe of Colorado as well as other tribes, have sent in letters discussing my activities and their experience with them.

I take the trust responsibility seriously. I take the consultation responsibilities seriously that I'm going to consult with tribes and I'm also going to consult with states and local entities.

Senator FRANKEN. I understand that answer, but I just want to respond very quickly to it.

That is not what I am hearing from my friends in Indian Country at all in terms of, not you personally, but of, for example, when it comes to the DOI's status review of Bears Ears National Monument, that there has not been consultation. And this is very concerning to me.

Thank you.

The CHAIRMAN. We will now begin a second round, although I do understand that we are supposed to have two votes at noon. I have not seen them noticed up yet, but we will just be aware of that.

Mr. Bernhardt, we have had an opportunity to discuss the situation in Alaska. As you know, our state's economy has been very reliant over the past several decades on the oil that comes to us through the North Slope. The Trans Alaska Pipeline is about three-quarters empty. It carries about 500,000 barrels a day, not due to

lack of resource up there, but really more to almost a blanket lack of permission to access our federal lands.

If you are confirmed as Deputy Secretary, and again, I am certainly going to be helping to make that happen, but can you give your commitment to me that you will make it a priority to work with me, with the other members of the Alaska delegation, with our Governor, to develop a plan to figure out how we refill our Trans Alaska Pipeline?

Mr. BERNHARDT. Absolutely.

I was—I hadn't looked at the volume in TAPS for a while, and I was very surprised by the significance of the decline. I will absolutely make it a priority to work with you on that specifically.

The CHAIRMAN. Well, we look forward to that.

Let me ask about some of the reports that have come out of the Interior's Inspector General over the last few years regarding the Park Service and other DOI agencies. These have included not only the agencies, but also the previous Park Service Director himself, on topics ranging from sexual misconduct to major ethical violations.

What do you think needs to be done? What do we need to do to improve, not only within the Park Service but the Department of the Interior as a whole to avoid this kind of conduct by employees in the future and ensure a more positive work environment by not only the employees, but to ensure that our visitors to our public lands have the most positive experience possible?

Mr. BERNHARDT. Well Senator, on a personal level, as Katie sits behind me, I can't fathom her being subjected to a work environment where she's treated hostilely, just because of her gender. And I will do everything I can on the personnel side to deal with that.

But I think that we need to look at where the cultural priorities of the Department are. The Secretary has said from the top we are going to have a cultural accountability.

And the reality is that when I went into the Department as Solicitor in 2006, what I did is I went and pulled a number of the reports and investigations that people have talked about today. I went line by line through them doing things like finding ethics experts who were experienced, expanding the ethics program within the Department significantly, locating ethics officials where there were a high degree, where there were many personnel, for example, in Denver. And I created a very robust plan that I implemented after hearing what the Inspector General had to say. What was interesting to me when I went back recently to go through the pre-clearance process here, is that those same folks are there.

I think we really need to ask ourselves is there more needed, because obviously there are serious issues at Interior and agencies like the Park Service and we need to beef up and that may require us asking you for additional help.

But we need to create a culture of accountability and then we have to send a message, very clearly, that the culture we have is one of employee safety and ethical conduct.

The CHAIRMAN. I appreciate that. I think we all recognize that matters of ethics and integrity are ones where there can be no compromise, no give, that they need to be to the highest standard.

Mr. BERNHARDT. Sure.

The CHAIRMAN. And I appreciated the depth of the discussion that we had in my office about just this and you outlining what you had done within the Department during your tenure there to focus specifically on it.

I also further noted with some interest that you happened to be married to an individual who devotes her daytime job to a focus on ethics as well. So I think that that cannot hurt you in your analysis as well.

Mr. BERNHARDT. That's true. I have an ethics expert nearby.

[Laughter.]

The CHAIRMAN. Thank you.

Senator Cantwell? I note that Senator Cortez Masto has just come in and has not yet had a first round, but your deference here.

Senator CANTWELL. Are you going to continue through the vote, Madam Chair?

The CHAIRMAN. Well, we have to.

Senator CANTWELL. I will just go, thank you, Madam Chair.

Our last question was on this issue of the transition team.

Regardless of whether the Whistleblower Enhancement Act applies to the transition team, do you believe the transition team's non-disclosure agreement authorizes the withholding of information from Congress?

Mr. BERNHARDT. Well, I certainly believe that I've signed a non-disclosure agreement and to the extent that that non-disclosure agreement exists, I have to ensure that I've done everything I can to comply with that.

Senator CANTWELL. Do you think it is a good policy that the President's transition team actually requires the transition team to withhold information from Congress? Do you think it is a good idea?

Mr. BERNHARDT. I don't know if they've made that assertion or not.

Senator CANTWELL. Do you think it is a good idea?

Do you think it is a good idea, in general, for the transition team to withhold information from Congress?

Mr. BERNHARDT. At the end of the day I felt that it was acceptable for me to sign a non-disclosure agreement and I did, and I'm obviously bound by that agreement.

Senator CANTWELL. Okay, I will take that on its face, what you have said.

Your firm, I know, has an agreement on this Cadiz issue in the value of stock. Has your firm benefited recently from the announced Trump policy on Cadiz or has it benefited to date in the context of this, since the time of the policy?

Mr. BERNHARDT. In terms of?

Senator CANTWELL. Increased payment, benefited financially.

Mr. BERNHARDT. Not that I'm aware of.

Senator CANTWELL. Okay.

Was the compensation reflected in any—you had a personal financial disclosure statement that is about stock and equity and is there any updated financial disclosure on that that we haven't seen since?

Mr. BERNHARDT. Well, I think the way the process worked is I had to submit a letter to you. I believe, maybe even yesterday or



Tuesday that it contained any updates as they related to my interests. And that has been submitted to you and obviously, it does not include anything related to the Cadiz matter or anything like that. I specifically have no interest in those, I think, items.

Senator CANTWELL. Okay, so nothing reflects in that statement any kind of payment or increase in payment through the firm to you prior to this filing?

Mr. BERNHARDT. Well, it would, I believe the letter includes what would be the, my draws, for one or maybe two months as it related to the, whatever the time horizon of the letter is.

Senator CANTWELL. On the issues of both Westlands and Cadiz, I think what you have testified to is that you would adhere to whatever recusals are required, for a one-year period, and then whatever the Administration requires, so maybe a two-year period.

Don't you think the general public would wonder, have concerns about, a recusal period for a longer period of time on something where the investment and performance of your firm will be resulting in decisions on Cadiz in the future?

Mr. BERNHARDT. Well, I've signed exactly the same agreements that folks that were reported out of the Committee with your support included. On top of that, whatever my firm's interests may or not be, the minute I walk out of that firm, I have no interest in their interest. And that is the way the law operates. That's the way the law is set up, and that is the way I will follow the law.

Senator CANTWELL. You don't find it a conflict that you have worked for this firm and you have been part of the Department of the Interior, you could go back to this firm. Clearly during the transition period this firm's payment as it relates to stock value has gone up just because of the decisions of the Administration.

So, yes, I have a question about whether you had any discussions with anybody during that time period to influence the decision by the Administration. You have said that you haven't. I personally think that Westlands and Cadiz represent such large public policy issues with financial interests that it would be better if you recused yourself for the entire time that you were at the Department, not just one or two years. Do you have a comment about that idea?

Mr. BERNHARDT. Well, I appreciate that you have that perspective.

I can sit here and walk through numerous nominees that you've supported that you didn't ask that of and the reality is I will follow all of the recusals I have and on top of that, if I get a whiff of something coming my way that involves a client or a former client or my firm, I'm going to make that item run straight to the Ethics Office. And when it gets there, they'll make whatever decisions they're going to make and that will be it for me.

Senator CANTWELL. I would ask you to think about a longer term than one or two years.

Thank you, Madam Chair.

The CHAIRMAN. Let's turn to Senator Gardner.

The vote has started so my hope is that we can power through this last round pretty quickly.

Senator GARDNER. Yes, thank you, Madam Chair.

I think it is important to this conversation that we are reminded of the Hayes/Schneider standard which was a standard put forward

when David Hayes and Janice Schneider were confirmed. I think one worked for the Clinton Administration, was confirmed by the Senate, went into the private sector, worked at a law firm, represented clients, then came back and was confirmed into the Obama Administration.

The Schneider nomination, the same thing. I believe she worked in the Clinton Administration, was a partner at Latham and Watkins, the law firm, represented a variety of clients, came back and was confirmed in the Obama Administration.

All of them, including the Hayes/Schneider contingency, were cleared by the Department of Government Ethics. They had the same agreements put in place. And so, the Hayes/Schneider standard that they were confirmed with is the same standard that, I hope, we continue to look at nominees who have gone into the private sector and gained that valuable experience that would be nice to be able to apply to their public service, to understand what happens in the private sector and how that impacts, the real-world impacts, and how that can be utilized when it comes to better government service.

I also want to talk a little bit about the Southern Ute Indian tribe letter. I did not get a chance to read it. I read one of the letters of support, the Colorado Water Congress. I am going to read the last paragraph of the Southern Ute Indian tribe. And I will just add this about the Southern Ute Indian tribe. They are a tribe that supports the Bears Ears National Monument designation. So here is a tribe that is part of the coalition that supports Bears Ears designation. And it says this, "A native of Colorado, Mr. Bernhardt, is aware of our tribe's unique history, particularly the role that meaningful, self-determination has played in our achieving economic prosperity for our tribe." I am paraphrasing the sentence.

It goes on to say, "We believe that Mr. Bernhardt is well positioned to help lead the Department of the Interior in a manner that respects the federal trust responsibility to Indian tribes and empowers tribal communities to exercise greater self-determination."

I think if there is any question or concern that related to prior questions, I think this Southern Ute Indian tribe letter explains that and the work that you do, in fact, the tribe that supports the Bears Ears National Monument designation.

I think that if we are going to continue to treat nominees as we have others and I know there can be particular politics at the time that demand different tactics and techniques, but again, I appreciate your willingness to come out of the private sector and to provide that valuable public service to the government.

Thank you, Madam Chair.

Mr. BERNHARDT. Thank you, Senator.

The CHAIRMAN. Thank you, Senator Gardner, I appreciate a little bit of that background, because I think it is an important part of the record.

Let's go to Senator Cortez Masto, if we may.

Senator CORTEZ MASTO. Thank you, Madam Chair, and Mr. Bernhardt, it is good to see you again.

I am juggling three committees at the same time, so I so appreciate you coming in and having the opportunity to sit and talk with you. Thank you.

As you well know, as we discussed, in my state we have the greatest amount of public lands, more than any other state in the nation. Not only do I believe that we must protect our lands with federal oversight, but I am a firm believer in the benefits of national monuments to our economy and our communities.

As I have seen in my own state of Nevada, Gold Butte and Basin and Range provide incredible opportunities for outdoor recreation, not only for the enjoyment of Nevadans, but for a resilient economy for neighboring rural communities. Nevada supports its monuments.

In fact, the Pew Charitable Trust in 2015 study that a national monument designation for Gold Butte could contribute nearly \$2.7 million per year in economic activity and increase the number of jobs by 60 percent.

In Nevada alone, the outdoor recreation economy generates 148,000 jobs and \$14.9 billion, according to the Outdoor Industry Association, and at least 57 percent of Nevada residents participate in outdoor recreation each year.

I look forward to working with you. I do know, if appointed as the Deputy Secretary, you will oversee the Bureau of Land Management and the National Park Service. We have also seen an Executive Order from the Administration looking at the impact of the Antiquities Act and particularly Gold Butte Basin and Range are impacted.

I am curious what your approach would be with respect to those monuments and would you consider, as you look at those, and if you are considering those, would you consider widespread support from the state as important, as well as the outdoor recreation it provides to the state as well, in your consideration?

Mr. BERNHARDT. Yes, obviously, I'm not involved in that review yet because I'm not there. But to the extent that I were to be involved in that, undoubtedly, strong support from the state, impacts to the economy have to be factors that are considered.

Senator CORTEZ MASTO. Okay.

Again, I invite you to come out as well. The invitation is open. We would love to have you back in Nevada.

Also, along that route, Resource Advisory Councils (RACs) are a crucial way for DOI to get diverse community input on public land management and RACs have helped inform decisions on issues related to recreation, land use planning, wildfire planning, wildfire management issues. I will tell you I am concerned that these meetings are being postponed right now in Nevada until September 2017 due to the full-scale review.

Do you believe community input is essential and will you continue to postpone these meetings once you are there as Deputy?

Mr. BERNHARDT. Well, I certainly believe that community input and involvement is essential. I can't speak to the specifics of that because I've read about it and that it occurred.

My sense would be that when I was at the Department of the Interior before RACs were a useful and important thing and that wasn't a cessation of them.

Senator CORTEZ MASTO. Can I ask that once you are appointed, or if you are appointed, that you will continue to look at allowing these meetings to move forward because obviously, as you go

through your review and if you are reviewing our national monuments, you would want input from our community members.

Mr. BERNHARDT. I certainly would commit to looking into it and coming back and talking with you about it once I have a more informed perspective.

Senator CORTEZ MASTO. Then we talked about this in the office, but just want to have it on the record. How would you approach wild horse management?

Mr. BERNHARDT. Well, as we discussed, that's a—I recognize that that's a very challenging item and I know that we need to get resolutions. So I have to learn a lot about it, but the minute I do, I'm going to sit down with you and other members of the delegation or other members of the Committee that have challenges with it. We have to find a solution and it has to be something that, you know, that recognizes the impact that is occurring in the environment and has to be workable long-term in terms of the budget. So it's just something I have to get up to speed on a little bit more, but I know it's become a huge challenge for BLM administratively and we've got to find a way to fix it.

Senator CORTEZ MASTO. Great.

And will you commit to working with us to find a solution?

Mr. BERNHARDT. Sure.

Senator CORTEZ MASTO. Thank you very much, and welcome to your family.

Thank you.

The CHAIRMAN. Thank you, Senator.

Senator Heinrich.

Senator HEINRICH. Thank you, Mr. Bernhardt, again for being so patient and sticking around for all of these questions.

I don't want to belabor my last question, but I just want to make sure we are actually on the same page. I asked about a tribal consultation with respect to any potential changes to the land and trust process. I think you used the phrase, meaningful engagement. I used the phrase, full tribal consultation. Can you just put a point on that?

Mr. BERNHARDT. Can I commit to you that that's a distinction without a difference?

Senator HEINRICH. Okay. That is exactly what I was asking.

I want to go back to something that was raised by Senator Cortez Masto as well as Senator King. Senator Udall of New Mexico and myself have worked for many, many years, hand in hand with local elected officials, mayors, county commissioners, city counselors and many others, as well as resource users and small businesses, recreationists, permittees, you name it, to create the Rio Grande del Norte and Organ Mountains Desert Peaks National Monuments.

In my view, I think these two monuments are really the gold standard for locally driven, public lands conservation that really grew from the grass roots up that did not come from Washington and were imposed on New Mexico, but communities in New Mexico came together and came to us and said, this is how we want to protect our backyards.

The results of these designations have not only been overwhelmingly popular in the respected counties, in Doña Ana County and

Taos County, in particular, but we have also seen visitation go up in these monuments. We have seen local tax receipts go up after their creation.

These two monuments currently fall under the Secretary's review process and our process that we went through included many years and included direct engagement with, as I mentioned, local elected leaders, local land owners, permittees, sportsmen groups, recreational groups, conservation groups, tribes and local businesses. That engagement was in addition to what the Department of the Interior did in terms of public meetings when they came out.

Does that sound to you like the kind of adequate public outreach with relevant stakeholders' approach that was referenced in the President's Executive Order?

Mr. BERNHARDT. Well it sounds pretty substantial to me.

Senator HEINRICH. I want to ask one last thing while I have a couple minutes before I go to a vote.

There was a case when you were in the Solicitor's Office where the Department reversed itself on a couple of tribal recognition decisions, and I know that it was noted by many at the time that the reversal occurred after some fairly intense pressure from local, not tribal, elected officials.

Basically it begs the question, how do you think Interior should conduct that formal tribal recognition process and what is the right way to go about that so that you don't end up in a position where there is a reversal?

Mr. BERNHARDT. So it's been a long time since I've been involved with a recognition issue and it's possible that the Department has changed things significantly.

But for me personally, my view of the recognition process is it's a process of looking at history, genealogy. It's an extensive, it should be an extensive process to make a determination of whether a potential group has the political significance and the other factors that apply. And it's really, it really should just be a fact-based decision.

Now it's possible some of those reversals that the folks in the Bureau didn't exactly dot their "I"s and cross their "T"s or maybe there were facts that they got wrong.

But the truth of the matter it should be devoid of——

Senator HEINRICH. Political consideration.

Mr. BERNHARDT. Politics. That's not the threshold, so that's my view and it's been my view.

I was very supportive of the branch of acknowledgement when I was there because, and this is not to be negative about gaming, but there's so much outside pressure and interest in these recognition decisions because of the consequences that they bring that I really felt that the Bureau of Reclamation should be as insulated from those types of activities as possible so that they could do the review that they need to do.

Senator HEINRICH. Okay.

Thank you, Mr. Bernhardt.

The CHAIRMAN. Thank you, Senator. Thank you for that.

Mr. Bernhardt, I appreciate your responses this morning. We do have to get to a vote immediately here.

But I do want to acknowledge the comments that Senator Gardner made with reference to previous individuals within the Department of the Interior, most notably, Mr. Hayes and Ms. Schneider.

It is the backgrounds, the similarities there. There are certainly parallels to you and the position that you are being considered for this morning. I would just remind colleagues that both were confirmed with strong support of members who might otherwise be interested in raising accusations against you here this morning.

So, I just remind us that we do not want to be in a situation where we have two different standards here. I think it is important that if you have policy disagreements with the nominee, this is the place to be bringing them up, but it is my hope that you are not going to be held to a different standard than past nominees and not held to a different standard than what exists under law.

I appreciate the time that you have given us. I appreciate the responses. I appreciate your willingness to serve, and I look forward to moving your name quickly through the confirmation process.

I think Secretary Zinke has a big job in front of him, and he needs a team. And I think that you can be a valuable asset to that team.

So with that, we stand adjourned and we thank you.

[Whereupon, at 12:20 p.m. the hearing was adjourned.]

## **APPENDIX MATERIAL SUBMITTED**

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U.S. Senate Committee on Energy and Natural Resources  
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Questions from Chairman Lisa Murkowski

**Question 1:** I appreciated your answer to my question on consultation with Alaska Natives and American Indians during today's hearing, and have a few brief follow-ups.

- a. Do you believe that tribal consultation is a requirement?
- b. What will you do to ensure meaningful consultation with tribal governments?

**Response to a. and b.:** Chairman Murkowski as I indicated at the hearing, I appreciate the importance of tribal consultation, take consultation seriously, and commit to consult with Alaskan Natives and American Indian Tribes. I will work with Secretary Zinke to implement a culture at the Department of the Interior that ensures opportunities for consultation, where appropriate.

**Question 2:** What is your view of compacting programs (other than programs in the Bureau of Indian Affairs) within the Department of the Interior? What would you do, if anything, to move forward with those efforts in this administration?

**Response:** I am strong supporter of efforts of self-governance and self-determination and believe that compacting can help facilitate meaningful economic improvement. However, I would need to learn more about any specific efforts before describing specific steps the Department should take. I would be happy to do so, if confirmed.



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Questions from Ranking Member Maria Cantwell

**Question 1: Cadiz Inc.**

**Regarding Cadiz Inc., please answer the following:**

- A. Your financial disclosure forms indicate that you have been providing legal services to a company called Cadiz Inc. Have you provided any services to Cadiz Inc. in the last 6 months? If so, what has been the nature of those services?**

**Response:** Yes. The nature of the services, as described in the OGE 278e Form that was provided to the Committee after undergoing review by the Office of Government Ethics, is identified as legal services.

- B. Please explain the extent to which your firm's compensation from Cadiz is based on agency or judicial actions and milestones.**

**Response:** I am not the lead attorney for Cadiz Inc. at my firm. While my private law firm does not publically discuss fee agreements, it is my understanding that the stock arrangement you reference is freely available on the world wide web as part of 8-K filings by Cadiz Inc.

- C. Since November of 2016 have you discussed or otherwise communicated about any issue or project that Cadiz Inc. has an interest in with any member of the following:**

- 1. The Presidential Transition Team, and if so who?**

**Response:** No

- 2. Executive branch employees (including political officials), and if so who?**

**Response:** No.

- 3. Members of Congress or their staff, and if so who?**

**Response:** No

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**D. Did you or members of your firm advise or in any way have involvement in the appearance of the Cadiz Water Conveyance Project on the Preside-Elect's Priority List of Emergency and National Security Projects?**

**Response:** I had no involvement with the appearance of the Cadiz Water Conveyance Project on the "Preside-Elect's Priority List of Emergency and National Security Projects," and I do not know if that is a document developed by the Presidential transition.

**E. Do you believe that you or your firm's advocacy or work on behalf of Cadiz Inc. in any way influenced the Bureau of Land Management's issuance of the Instruction Memorandum on March 29, 2017, rescinding the Washington Office Instruction Memorandum No. 2014-122—either directly or indirectly?**

**Response:** The nature of my services to Cadiz Inc is addressed in the materials that I have provided to the Committee that were reviewed and certified by the Office of Government Ethics. I did not engage in regulated lobbying for this client under the Lobbying Disclosure Act of 1995, however, to the extent members of my firm did, their activities are disclosed and publically available at [www.House.gov](http://www.House.gov).

**F. Have you or your firm received any compensation of any kind from Cadiz Inc., including additional shares of stock, since November of 2016? If so, is this compensation in any way reflected in the pay, equity, or bonuses you have received from Brownstein to date? Will the *pro rata* partnership distribution you receive upon your withdrawal from your firm reflect any fees or other form of compensation paid by Cadiz?**

**Response:** As previously stated, my private law firm does not publically discuss the fee agreements of our clients. To the extent that any revenues were received at our firm, expenses are paid and then funds are saved for contingencies and bonus pools, and a monthly distribution to partners is determined. If a monthly distribution is determined, I receive a pro-rata share of the distribution based upon my placement in the firm. Any pro-rata distribution would not include any value from any stock identified in Cadiz Inc's stock price.

**G. Will you recuse yourself from working on any matter in which Cadiz Inc. has as interest or on which you have worked on behalf of Cadiz Inc., for the duration of your service, if confirmed?**

**Response:** I believe that public trust is a public responsibility, that maintaining an ethical culture is important, and that it starts at the top. I will fully comply with the ethics agreement that I signed. In addition, as we discussed at the hearing, for the duration of my service at the Department, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding any particular matters involving specific parties of former clients or

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entities represented by my former firm. I will install a robust screening process, should one not exist within the office.

In addition, on May 4, 2017, the Committee received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol's correspondence included an enclosure of the "ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest." Further, General Counsel Apol explained, "we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest."

Finally, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement that I provided to and that was certified by Mr. Apol, and the agreements provided by other nominees to positions within the Department of the Interior who also worked in large private law firms representing similar clients, and in some cases the same clients. Indeed, nominees with very similar ethics agreements were favorably reported out of the Committee subsequent to the publication of the Inspector General's Report you referenced in your recent letter to me. Copies of two such ethics agreements are attached to this document.

Given General Counsel Apol's determination that the ethics agreement I signed complies with the Office of Government Ethics' regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those previously found by the Committee to be sufficiently clear to proceed with the nominations, with your personal support, I reaffirm to you that I will comply with the ethics agreement that I have signed.

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**Question 2: Westlands Water District**

**Regarding the Westlands Water District, please answer the following:**

**A. In what court cases and litigation have you represented the Westlands Water District? Please list the cases and their subject matter.**

**Response:**

| <b>Case Name</b>  | <b>Case #</b>   | <b>Subject</b>  |
|---|---|---|
| Westlands Water District v. United Sates                                    | 109 Fed. Cl. 177<br>12-cv-0012  | Water district's claims against the government for alleged breaches of purported contractual obligation to provide drainage to the district.                                |
| San Luis & Delta-Mendota Water Authority; Westlands Water District v. Locke | 776 F.3d 971<br>09-cv-1053-LJO-DLB<br>US Dist. Court of Eastern CA<br>Appeal: 12-15144, 15289, 15290, 15291, 15293, 15296 | Action pertaining to a formal Biological Opinion ("BiOp") developed by the Commerce Department's National Marine Fisheries Services pursuant to the Endangered Species Act. |

**B. During what dates were you registered as a lobbyist for the Westlands Irrigation District?**

**Response:** This information is addressed in the response I have provided to question 20 of the Statement for Completion by Presidential Nominees. In addition, this information is publically available at [www.house.gov](http://www.house.gov).

**C. On what matters did you lobby for on behalf of the Westlands Water District?**

**Response:** Potential legislation related to the Bureau of Reclamation.

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**D. Did you lobby or otherwise advise on any legislative language pertaining to the operation of the Central Valley Project or any related Biological Opinions on behalf of the Westlands Water District in 2016?**

**Response:** I was a registered lobbyist for Westlands Water District until November 2016. I was one of many attorneys across the United States who responded to technical drafting requests made by offices in the U.S. House of Representatives and U.S. Senate from members of both political parties. In that capacity, and upon their request, I provided technical drafting assistance.

**E. Did you advise any Members of Congress or their staff on such language after November 18, 2016?**

**Response:** I have not engaged in regulated lobbying on behalf of Westlands Water District after November 18<sup>th</sup>, 2016.

**F. Please provide complete records to the Committee on Energy and Natural Resources of any communications you had with any employee of Congress, the Presidential transition team or executive branch after November 18, 2016.**

**Response:** I am in full compliance with all disclosures and requirements required by the U.S. Senate for consideration as a presidential nominee, including the form entitled Statement for Completion by Presidential Nominees for the Senate Energy and Natural Resources Committee, the clearances required by the Office of Government Ethics and the ethics experts with the Department of the Interior's Ethics Office, and the background investigation by the Federal Bureau of Investigation. It is my understanding that these disclosures are entirely consistent with the past practice for nominees considered and reported favorably by this Committee on a bipartisan basis with the same background in a private law practice, including those who participated on a voluntary basis in presidential transitions.

**G. As an employee and shareholder in Brownstein, have you or will you receive any compensation or financial benefits of any kind from the fees collected from Westlands Water District since November 18, 2016?**

**Response:** As previously stated, my private law firm does not publically discuss the fee agreements of our clients. To the extent that any revenues were received at our firm, expenses are paid and then funds are saved for contingencies and bonus pools, and a monthly distribution to partners is determined. If a monthly distribution is determined, I receive a pro-rata share of the distribution based upon my placement in the firm.

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**H. Will you recuse yourself from working on any matter in which the Westlands Water District has an interest or on which you have worked on for Westlands for the duration of your service, if confirmed?**

**Response:** I believe that public trust is a public responsibility and that maintaining an ethical culture is important. I will fully comply with the ethics agreement that I have signed. As I explained at the hearing, for the duration of my service I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding any particular matters involving specific parties of former clients or entities represented by my former firm. I will install a robust screening process, should one not exist within the office.

That said, on May 4, 2017, the Committee on Energy and Natural Resources received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol's correspondence included an enclosure of the "ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest." Further, General Counsel Apol explained, "we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest."

In addition, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement that I provided to, and that was certified by, Mr. Apol and the agreements provided by other nominees to positions within the Department of the Interior who also worked in large private law firms representing similar clients, and in some cases the same clients. Indeed, nominees with very similar ethics agreements were favorably reported out of the Committee subsequent to the publication of the Inspector General's Report you referenced in your recent letter to me. Copies of two such ethics agreements are attached to this correspondence.

Given General Counsel Apol's determination that the ethics agreement I signed complies with the Office of Government Ethics' regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those previously found by the Committee to be sufficiently clear to proceed with the nomination, with your personal support, I reaffirm to you that I will comply with the ethics agreement that I have signed.

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**I. Will you recuse yourself from working on any matter pertaining to the Central Valley Project for the duration of your service, if confirmed?**

**Response:** As I have stated above, I believe that public trust is a public responsibility and that maintaining an ethical culture is important. I will fully comply with the ethics agreement that I have signed. For the duration of my service, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. In addition, I will install a robust screening process, should one not exist within the office.

**J. Will you recuse yourself from working on any matter pertaining to the Endangered Species Act and any relevant Biological Opinions that relate to the operation of the Central Valley Project for the duration of your service, if confirmed?**

**Response:** I believe that public trust is a public responsibility. I believe that maintaining an ethical culture is important. I will fully comply with the ethics agreement that I signed. For the duration of my service, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. In addition, I will install a robust screening process, should one not exist within the office.

**Question 3: Conflicts of Interest**

**On May 11, 2016, I sent you a letter asking you to clarify what steps you will take to avoid conflicts of interest. You have not responded. Please provide a written response to the questions contained in that letter, which were:**

- A. Please identify, with specificity, which particular matters involving your clients are currently pending before the Department, and any additional ones you believe may come before the Department within the next two years, which you understand your ethics agreement commits you to not participate in.**
- B. With respect to each of these matters, please identify "precisely what measure will be undertaken" to avoid an actual or apparent conflict of interest.**

**Response to A. and B.:** Seven days before you sent your correspondence to me asking these questions, the Committee on Energy and Natural Resources had received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol's correspondence included an enclosure of the "ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest."

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Further, General Counsel Apol explained, “we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest.”

In addition, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement that I provided to, and that was certified by, Mr. Apol and the agreements provided by other nominees to positions within the Department of the Interior who worked in large private law firms representing similar clients, and in some cases the same clients. Indeed, nominees with very similar ethics agreements were favorably reported out of the Committee subsequent to the publication of the cited Inspector General’s Report you referenced in your recent letter to me. Copies of two such ethics agreements are attached to this correspondence.

Given General Counsel Apol’s determination that the ethics agreement I signed complies with the Office of Government Ethics’ regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those the Committee previously found sufficiently clear to proceed with the nomination, with your personal support, I reaffirm that I will comply with the ethics agreement that I have signed.

In addition, as a general matter, it is my experience that the focus of the chief operating officer of the Department of the Interior will generally not be on particular matters involving specific parties. However, I intend to implement a robust screening process and work closely with the Designated Agency Ethics Official to ensure that I am implementing best practices in my office for the duration of my tenure, should I be confirmed.

**C. You reserve the right, in your ethics agreement, to seek a waiver from your recusals in accordance with 5 C.F.R. § 2635.502(d). Under what circumstances would you seek such a waiver? Would you commit to making any such waiver request public?**

**Response:** I do not know under what circumstances I might seek a waiver because I do not anticipate doing so. However, should I seek a waiver from the Designated Agency Ethics Official, I will discuss whether such a request should be made public.



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**D. You were widely reported in the press as heading President-elect Trump's transition team for the Department of the Interior, but make no mention of it in your questionnaire.**

- 1. Did you serve on President-elect Trump's transition team for the Department of the Interior? If so, in what capacity? Beginning when and ending when?**
- 2. Were you compensated for your service on the transition team?**
- 3. Were you still employed by your law firm while serving on the transition team? Were you still receiving compensation from your law firm while working for the transition team?**
- 4. Did you sign the transition team's ethics pledge? If so, please provide a copy.**

**Response to D1-4:** I served on the President's transition team throughout the transition as a part-time, unpaid volunteer from approximately September 19<sup>th</sup> through the inauguration.

Question number 8 of the Committee's Statement for Completion by Presidential Nominees, which I was asked by the Committee to complete, requests material related to employment positions held since college. I fully responded to that question. In addition, my response is consistent with the personal statement of other nominees who have come before this Committee, reported participation in the transition activities of prior administrations, but did not cite any transition activities in response to the employment question.

While I am unable to provide you copy of any ethics agreement I signed for that service, it is my understanding that one version of a Trump For America Ethical Code of Conduct is publically available through the world wide web at <http://www.wsj.com/public/resources/documents/ethicscode.pdf>.

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**Question 4: Recusals from Conflicts of Interest**

**A. Do you believe that your representation of some of your clients—like Westlands or Cadiz—has been so substantial that a reasonable person might question your impartiality beyond the one-year period in your recusal agreement and the two-year period in your ethics pledge under President’s Trump executive order?**

**Response:** No, nor do I believe would a reasonable person, after a 2 year period.

**B. Would you be willing to recuse yourself from particular matters involving those clients for the duration of your tenure at the Interior Department?**

**Response:** I believe that public trust is a public responsibility and that maintaining an ethical culture is important. I will fully comply with the ethics agreement that I signed. As I stated at the hearing, for the duration of my service I intend to actively seek and consult with the Department’s Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. In addition, I will install a robust screening process, should one not exist within the office.

That said, on May 4, 2017, the Committee on Energy and Natural Resources received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol’s correspondence included an enclosure of the “ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest.” Further, General Counsel Apol explained, “we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest.”

In addition, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement that I provided to, and that was certified by, Mr. Apol and the prior agreements provided by other nominees to positions within the Department of the Interior who worked in large private law firms representing similar clients, and in some cases the same clients. Indeed, nominees with very similar ethics agreements were favorably reported out of the Committee subsequent to the publication of the Inspector General’s Report you referenced in your recent letter to me.

Given General Counsel Apol’s determination that the ethics agreement I signed complies with the Office of Government Ethics’ regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those the Committee previously found sufficiently clear to proceed with the nomination, with your personal support, I reaffirm that I will comply with the ethics agreement that I have signed.

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**Question 5: Service on the Presidential Transition Team**

Regarding your service on the Presidential Transition Team for Donald J. Trump, please answer the following questions:

**A. Did you discuss any matter or issue for which you or your firm provide legal or lobbying services with the Presidential Transition Team? If so, what matters or issues? Please list them.**

**Response:** I was not involved in any particular transition matter for which I or my firm provided legal or lobbying services.

**B. As a lawyer, do you believe that a Presidential transition team's non-disclosure agreement authorizes the withholding of information from Congress?**

**Response:** No.

**Question 6: Antiquities Act**

**Do you agree with President Trump that the use of the Antiquities Act to designate national monuments is an "egregious abuse of federal power?" If so, please provide specific examples of national monuments designations that you believe reflect an abuse of federal power.**

**Response:** As I stated at my hearing, any decisions on monument designations will be made by President Trump. He has stated that public outreach and proper coordination with state, tribal, and local officials and other relevant stakeholders are key elements of any designation, and I agree with this view. I understand that Secretary Zinke is currently reviewing certain monument designations made since 1996. If confirmed, I will support the Secretary and President as appropriate.

**Question 7: Offshore Drilling**

**A. Please provide a list of the clients for which you have provided lobbying or litigation services since January 2009, on matters pertaining to federal leasing policies on the Outer Continental Shelf. Please identify the matters on which you lobbied and the litigation in which you represented each client.**

**Response:** Please see question 20 of the Statement of Completion by Presidential Nominees, which references Cobalt International Energy Incorporated. I have also represented the National Oceans Industry Association as a defendant intervenor in a federal district court case in the United States District Court for the District of Columbia, where judgement was

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entered on March 12, 2014.

**B. Please identify which clients lobbied or litigated on each of the following:**

(1) The rule entitled "Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control" 81 *Fed. Reg.* 25888 (April 29, 2016);

(2) The proposed rule entitled "Air Quality Control, Reporting, and Compliance," 81 *Fed. Reg.* 19718 (April 5, 2016);

(3) NOAA's Technical Memorandum NMFS-OPR-55 of July 2016 (Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing); and

(4) The Final Rule entitled "Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf," 81 *Fed. Reg.* 46478 (July 15, 2016).

**Response:** As described in my Statement for Completion by Presidential Nominees, I have not engaged in regulated lobbying activities regarding such issues since 2013, nor have I litigated on any of the matters described in 1-4.

**C. Did you advise the Presidential Transition Team on matters pertaining to Federal Offshore Leasing policy? If so, please provide any written documentation associated with the policies you advocated.**

**Response:** My role did not include advocacy.

**D. Given your previous activities lobbying and litigating on matters relevant to federal offshore leasing policies, will you recuse yourself from activities undertaken by the Department pursuant to the Executive Order issued April 28, 2017, entitled "Implementing an America-First Offshore Energy Strategy"?**

**Response:** I believe that public trust is a public responsibility and that maintaining an ethical culture is important. If I am confirmed, I will seek the guidance of the Designated Agency Ethics Official regarding all actions that I must take to comply with my ethics agreement. I will fully comply with the ethics agreement I signed. Moreover, for the duration of my service I intend to actively seek and consult with the Department's Designated Agency Ethics Official, regarding particular matters involving specific parties of former clients or entities represented by my former firm. In addition, I will install a robust screening process, should one not exist within the office.

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That said, on May 4, 2017, the Committee on Energy and Natural Resources received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol's correspondence included an enclosure of the "ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest." Further, General Counsel Apol explained, "we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest."

In addition, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement that I provided to, and that was certified by, Mr. Apol and the prior agreements provided by other nominees to positions within the Department of the Interior who worked in large private law firms representing similar clients, and in some cases the same clients. Indeed, nominees with very similar ethics agreements were favorably reported out of the Committee subsequent to the publication of the Inspector General's Report you referenced in your recent letter to me.

Given General Counsel Apol's determination that the ethics agreement I signed complies with the Office of Government Ethics' regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those the Committee previously found sufficiently clear to proceed with the nomination, with your personal support, I reaffirm that I will comply with the ethics agreement that I have signed.

**E. Do you support the current moratorium in relation to offshore drilling in the Eastern Gulf of Mexico?**

**Response:** I am aware that, in response to the President's recent Executive Order on the Outer Continental Shelf, Secretary Zinke issued a Secretarial Order 3350 directing the Bureau of Ocean Energy Management to review and develop a new five-year plan. I support the President's and Secretary's actions to examine new leasing opportunities within the OCS in order to advance the Administration's energy agenda.

**F. Do you support extending this moratorium?**

**Response:** As discussed in the response to the previous question, I support the President's and Secretary's actions aimed at increasing offshore production while balancing conservation objectives.

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**Question 8: Congressional Requests**

I would like to clarify how you intend to treat Congressional requests for information. When you were the Director of the Office of Congressional and Legislative Affairs under President Bush, in 2003 you responded to the committee's ranking member that you were processing his request for information in accordance with the Freedom of Information Act, and that you were withholding information not subject to disclosure under that Act.

- A. If confirmed as Deputy Secretary, what standard will you use in determining how to handle requests for information from Members of Congress? What kinds of information do you believe are exempt from disclosure when responding to Congressional requests for information?**

**Response:** The Department itself needs to carefully weigh every request from Congress and ensure it is meeting the needs of Congress to facilitate harmonious relationships with you and this Committee. As I stated in 2006, my personal view is that the Department of the Interior needs to provide full disclosure to Members of Congress, subject to the Department of Justice's guidelines. In 1998, the Chief of Staff for the Secretary of the Interior promulgated guidance for the Department and stated in that guidance that was to treat requests from individual members under FOIA. Since that time, I have reviewed the Department of Justice's guidelines and I think that the Department's 1998 guidance missed a number of caveats that were contained within the Department of Justice's guidelines.

- B. Does the Administration have a formal or informal policy of not responding to requests for information from Democratic Members of Congress?**

**Response:** Not to my knowledge.

- C. Will you commit to responding in a timely manner to all Congressional questions or informational requests, whether submitted by a Republican or Democratic member?**

**Response:** I expect the Office of Congressional Affairs to make its best efforts to do so.

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**Question 9: Use of Public Lands**

**A. Do you believe that extractive development (such as oil, gas, mining etc.) is inherently a better use of our public lands than using those lands for conservation or outdoor recreation use? Can you provide any specific examples of where you have advocated conservation or recreation purposes over development of specific public lands?**

**Response:** I do not believe that extractive development is an inherently better use. A specific example of advocating for conservation was the resolution of the National Park Service claims for the Black Canyon of the Gunnison reserved water rights.

**B. Is there any case of suspending energy or mineral extraction on federal lands that you would support, and, if so, what would be an appropriate case for a Secretary or President to do so?**

**Response:** I am in agreement with Secretary Zinke that development can and should be conducted in accordance with the principles of multiple use. If confirmed, I will work with the Secretary to balance uses, including hunting, fishing, hiking, and other forms of recreation, which play an important role on public lands.

**Question 10: Impact of Trump Budget Proposal**

The President's initial budget request for the Department of the Interior is \$11.6 billion for FY 2018, a \$1.5 billion or 12 percent decrease from the currently enacted spending level. If confirmed as Deputy Secretary, you will be the chief operating officer for the department. What would the impact be of a 12 percent budget cut be on the department, including on tribal programs, on national park operations, and other key agency programs?

**Response:** The impact of such a cut would depend on how the 12 percent cut was allocated or structured, which is information that I do not have access to at this time.

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**Question 11: Hardrock Mining**

Hardrock mines pay no federal reclamation fee, unlike coal mines. Nor do they pay any royalty. In his confirmation hearing, Secretary Zinke stated that “this is where we need to have the discussion. [...] And I’ll be glad to work with you on it because it needs to be fair.” Do you agree with Secretary Zinke that hardrock mines on federal land should get a similar treatment to keep our policies fair?

**Response:** I agree with Secretary Zinke that we should have the discussion and that it needs to be fair.

**Question 12: Coal Moratorium**

On March 29, Secretary Zinke ended a moratorium on federal coal leasing and all work on a programmatic environmental impact statement (EIS) begun under Secretary Jewell. Last week, a group of states sued the Department for violating the National Environmental Policy Act, given the Secretary’s claim that “the public interest is not served” by continuing the BLM’s scientific review. Given your experience with the Department’s alternation of scientific conclusions under Secretary Norton, do you think it is credible or legally defensible for the Department to ignore the science already reviewed by the BLM in its January scoping report?

**Response:** I reject the premise of your question, and I have not reviewed the referenced report. Should I be confirmed, I would be happy to opine. I am skeptical that “science” was ignored.

**Question 13: Coal**

On March 29, 2016, Secretary Zinke announced that a comprehensive review of the federal coal program would be terminated, along with lifting a moratorium on significant new coal leases pending the outcome of that review.

- A. Do you agree that the federal coal leasing program is flawed and needs to be modernized, consistent with two decades or more of independent audits and evaluations?

**Response:** I believe that most programs, including the coal program, could be modernized and improved, but I have not reviewed the mentioned reports.



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- B. Will you commit to addressing these long-standing problems and ensure that Americans receive a fair economic return for these public resources before significant new leasing occurs?**

**Response:** I am committed to ensuring that American taxpayers receive a fair return for public resources.

**Question 14: Improving BLM Oil and Gas Permitting Practices**

In a recently published report, the GAO identified insufficiencies in the BLM's practices with respect to the development of oil and gas on Federal lands. In particular, after investigating 42 BLM offices, the GAO found that the extent to which the BLM approves requests for exceptions to environmental lease and permit requirements is unknown. The BLM doesn't keep records of who actually submits exception requests, nor does it keep records of request determinations – which raises the question of whether the agency can meet its statutory environmental responsibilities. The same is true for inspections. The GAO found that the BLM didn't use data from site inspections to evaluate whether its permit process was protecting the environment. The BLM doesn't have procedures or guidance on how inspections should be documented and how inspection data should be used. Further, the BLM doesn't always include the public during the permitting stage of development. The GAO found that by not allowing the public to participate in drilling decisions derived from the prior public planning process, the BLM created a set of conditions that allow poor drilling practices to continue to go unchecked. Will you commit to continuing the Department's work to implement the recommendations of the GAO with respect to these issues and improving these processes?

**Response:** If I am confirmed, I can commit that the Department will consider the GAO's recommendations and incorporate them, as appropriate.

**Question 15: Onshore Oil and Gas Royalties**

- A. Do you believe that Americans are getting a fair return under the current valuation rules for production of oil and gas on federal lands?**

**Response:** I am informed that Secretary Zinke has tasked the Royalty Policy Committee to determine whether taxpayers are getting a fair return and I look forward to the results.

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**B. Can you tell me how, if confirmed, you will work with Secretary Zinke to achieve a common goal of ensuring a fair return to taxpayers?**

**Response:** I agree that we must ensure taxpayers are getting a fair return. As stated previously, if confirmed I look forward to learning the results of the Royalty Policy Committee's efforts.

**Question 16: BLM Master Leasing Plans**

Master leasing plans (MLPs) were designed to provide a legal framework for evaluating oil and gas proposals, in particular because as recently as 2009, BLM staff "believed they were required by law to give greater deference to mineral leasing proposals than to the protection of other land uses..." Do you agree that MLPs are necessary in removing ambiguity around multiple land use?

**Response:** I agree that clear guidance is a necessary component of successful policies. I would need to learn more about the framework to provide a meaningful response to this question. If I am confirmed I would be happy to get up to speed on the issue and meet with you to discuss it further.

**Question 17: Taylor Energy**

**A. If confirmed, will you ensure that Taylor Energy will remain financially responsible to respond to the ongoing oil discharge from the well?**

**B. Since your firm worked directly with Taylor Energy, will you recuse yourself from all future work on this topic since you advocated for one particular outcome in the past?**

**Response to A and B:** I believe that public trust is a public responsibility and that maintaining an ethical culture is important. If I am confirmed, I intend to seek the guidance of the Designated Agency Ethics Official regarding all actions that I need to take to comply with my ethics agreement. I will fully comply with the ethics agreement I signed. Moreover, for the duration of my service, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. In addition, I will install a robust screening process, should one not exist within the office.

That said, on May 4, 2017, the Committee on Energy and Natural Resources received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

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In addition, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement that I provided to, and that was certified by, Mr. Apol and the agreements provided by other nominees to positions within the Department of the Interior who worked in large private law firms representing similar clients, and in some cases the same clients. Indeed, nominees with very similar ethics agreements were favorably reported out of the Committee subsequent to the publication of the Inspector General's Report you referenced in your recent letter to me. Copies of two such ethics agreements are attached to this correspondence.

Given General Counsel Apol's determination that the ethics agreement I signed complies with the Office of Government Ethics' regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those the Committee previously found sufficiently clear to proceed with the nomination, with your personal support, I reaffirm that I will comply with the ethics agreement that I have signed.

**Question 18: Arctic**

**You recently served as Counsel to the State of Alaska in *State of Alaska v. Jewell, et al*, which challenged the Department of the Interior's decision to deny the state a permit for exploratory oil and gas studies in the 1002 section of the Arctic National Wildlife Refuge. Due to your inability to maintain impartiality on this issue, will you recuse yourself from issues relating to drilling in the Arctic National Wildlife Refuge?**

**Response:** I reject the premise of your question, which appears to be that litigation on a particular legal question regarding whether the lawfulness of Department of the Interior actions creates a presumption of permanent partiality on different matters. I believe that public trust is a public responsibility and that maintaining an ethical culture is important. If I am confirmed, I will seek the guidance of the Designated Agency Ethics Official regarding all actions that I need to take to comply with my ethics agreement. I will fully comply with the ethics agreement I have signed. For the duration of my service, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. In addition, I will install a robust screening process, should one not exist within the office.

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Moreover, on May 4, 2017, the Committee on Energy and Natural Resources received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol's correspondence included an enclosure of the "ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest." Further, General Counsel Apol explained, "we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest."

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**Question 19: Bush Administration Scandals**

**During your time as Solicitor at the Department of the Interior under President George W. Bush, the Deputy Assistant Secretary for Fish, Wildlife and Parks—Julie MacDonald—resigned her position after being found to have committed unethical activities, specifically pressuring Fish and Wildlife Service scientists to alter findings and data to suit political ends in regards to Endangered Species Act determinations. In the Inspector General's report on this scandal, it was pointed out that you had been very involved in ESA decisions and were the person who would make final decisions on such matters should a dispute arise. Can you give an account of your involvement in tampering with scientific findings and in the Julie MacDonald issue on the whole? Do you currently work with Ms. MacDonald in her role with Westlands Water District?**

**Response:** I became involved with matters related to the Endangered Species Act because the listing, critical habitat, and litigation defense process seemed broken as I evaluated the work of the Office of the Solicitor. The implementation program, from a legal review process, was a mess. Indeed, it is demonstrated in the report you reference that some lawyers

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in the Solicitor's Office had found packages drafted in the field and region to be not legally sufficient for years – and not merely as result of the actions of the Deputy Assistant Secretary. I thought this was a serious problem, and I knew improvements to the Office of the Solicitor's role were necessary to support these decisions. As a result of reaching this conclusion, I took various steps to address the challenges shortly after I was sworn in as Solicitor. For example, one of my first acts as Solicitor was to provide clear direction on what it meant to complete a legal review as an office of the Solicitor attorney, and my expectations as to how issues should be elevated to reach resolution if the bureau's client representatives were not accepting the legal advice that was provided. In addition, I began an effort to evaluate certain questions to evaluate the defensibility of legal positions that did not appear successful and to address other questions the U.S. Fish and Wildlife Service seemed to be grappling with.

I was not involved in tampering with scientific findings, and any such inference is wrong.

As I explained, I put in place mechanisms to ensure that lawyers' comments on flawed packages were elevated through the ranks all the way to the Deputy Secretary, if necessary, to ensure such matters were resolved. It is concerning that such mechanisms appear to have not remained in place in recent years.

I am not aware of any referenced role Ms. MacDonald has with Westlands Water District.

**Question 20: Maintaining Public Lands**

**Secretary Zinke has stated plainly to this committee that he will not sell or transfer our public lands. Will you also commit to keeping our public lands in the federal estate?**

**Response:** I share Secretary Zinke's opposition to the sale or wide scale transfer of federal lands. As the Secretary offered in his written responses to this Committee, "...there are some situations in which commitments have previously been made, inholdings need to be swapped or exchanged, or land banks are well situated to address the needs of growing urban areas, where limited transfer is appropriate." I would need to review such proposals before making any decisions.

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**Question 21: Methane**

**As you know, the BLM Methane and Natural Gas Waste Prevention rule is in effect after some in Congress failed last week to nullify the rule under the Congressional Review Act.**

**A. Prior to your service on the President-elect's transition team, did you engage in lobbying on behalf of oil and gas clients on this rule?**

**Response:** No, I have not engaged in regulated lobbying on this issue.

**B. What are your plans for effectively implementing this rule to ensure producers do not waste valuable energy resources we all own, while exercising the considerable flexibility built into the rule to contain the costs of compliance.**

**Response:** I echo the Secretary's commitment to ensuring that the American taxpayers get a fair return from natural resource development on federal lands. If confirmed, I will support the Secretary's efforts to review this regulation, in addition to other programs at the Department, and to evaluate whether there are opportunities to ensure that fair return is captured.

**Question 22: Wilderness**

**Our nation's public lands are incredible assets to the country that support a booming outdoor recreation economy as well as clean air, clean water, and healthy ecosystems for wildlife. At the core of these public lands are the designated wilderness areas across the country that provide the most rugged, wild, outdoor experiences one can have.**

**Will you commit as Deputy Secretary of Interior to protecting and enhancing these incredible places so that their wilderness values are upheld for all future generations of Americans to enjoy?**

**Response:** Like you, in general, I find wilderness areas to provide the most rugged wild outdoor experiences one can have, and I believe they provide special solitude and enjoyment today and into the future.

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**Question 23: Tribal Consultation**

Tribal Consultation is governed by Executive Order 13175 and requires consultation with tribes on all “Policies that have tribal implications,” including “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” Will you fully comply with and Tribal consultation requirements and ensure that the Department will conduct meaningful tribal consultation on all policies that have tribal implications?

**Response:** As I indicated at the hearing, I appreciate the importance of tribal consultation, take consultation seriously, and commit to consult with tribes.

**Question 24: Trust responsibility to Tribes**

The federal government has moral and legal obligations to uphold its treaty and trust responsibilities to Native Americans and engage with tribes on a government-to-government basis. This government-to-government relationship is the basis for tribal consultation, the process by which the United States engages in a meaningful, good-faith dialogue with tribes. Interior, by virtue of its role in Native American affairs, plays a prominent part in how the government engages in tribal consultation.

- A. If confirmed, will you uphold the federal trust responsibility and ensure that tribes are provided with adequate government-to-government consultation on any issue that may affect them?
- B. In the wake of the Dakota Access Pipeline, three federal agencies, including Interior, published a report in January 2017 entitled, “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions.” The subject of months-long consultation across Indian country, this report sets forth a number of recommendations to improve the process for permitting and infrastructure development. What steps do you intend to take to incorporate this report into the agency’s decision-making process?

**Response to A. and B.:** Before I was out of law school, I was receiving lessons outside class on the meaning of the federal government’s trust responsibility from a remarkable tribal leader and his longtime attorney, as they tried to advocate their interests in Congress. They both had a very significant impact on the development of my perspective of the trust responsibility and self-determination. I am not familiar with the report published by the previous Administration, but as I indicated at the hearing, I appreciate the importance of tribal consultation and take it and the trust responsibility seriously.

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More important than my views, however, are the words of Tribes who know me, such as the Southern Ute Tribe, which has stated its belief that I “am well positioned to help lead the Department of the Interior in a manner that respects the federal trust responsibility to Indian tribes and empowers tribal communities to exercise greater self-determination.”

**Question 25: Co-management with Tribes**

**Do you believe in co management when tribes have a significant interest in cultural preservation of an area?**

**Response:** I think co-management can be appropriate. From my perspective, it is appropriate to consider such matters on a case-by-case basis. I believe it is worth looking at and accommodating, where appropriate.

**Question 26: Tribal Trust**

Secretary Zinke recently stated that tribes should have an “off-ramp” with regard to the Indian Reorganization Act – that tribes should “have a choice of leaving Indian trust lands and becoming a corporation . . .” The last time an administration attempted to privatize Indian lands was nearly seventy years, when Congress terminated more than one hundred tribes and small bands, depriving nearly 1.4 million acres of land of federal trust protections. In most cases, the impact of termination on a tribe was to increase poverty.

**A. Can you please clarify the Secretary’s remarks regarding privatizing Indian country?**

**Response:** I am not aware of the remarks.

**B. Can you please share your views on the importance the Administration will place on the land to trust process?**

**Response:** I have not discussed this issue with the Secretary or anyone in the Administration and thus have not formed a view.

**Question 27: Tribal Land into Trust**

Restoring tribal homelands rebuilds tribal land bases and strengthens the relationship between tribes and the federal government. It also makes administering justice and engaging in economic development easier by reducing checkerboard landholdings. During your time at the Department of the Interior, it is reported that the Department imposed a de facto moratorium on land into trust acquisitions through agency



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memorandums.

- A. Can I get a commitment from you that the Interior Department will not put in place a land into trust moratorium? If you can't make that commitment, would you at least commit to a transparent process that prioritizes meaningful consultation with tribes and tribal organizations - on an open and fair basis - so their voices can be heard on any proposed changes to the Department's land into trust procedures?

**Response:** I will commit to learning more about the matter and talking to your staff.

- B. In 2008, the Department of the Interior, through then-Assistant Secretary Carl Artman, finalized guidance for restricting land to be taken into trust related to gaming. The Department did not consult with tribes in drafting this guidance. Can I get a commitment from you that the Interior Department will consult with tribes on a government-to-government basis when developing any additional guidance or regulations as it pertains to land into trust acquisitions?

**Response:** I am not sure what, if any, actions have been taken regarding this matter, but in general, I support consultation.

**Question 28: Tribal Sovereignty**

Well-settled principals of tribal sovereignty provide that tribes be free from interference of state and local jurisdictions. While you were Solicitor, however, you spearheaded sweeping changes to Interior's off-reservation trust acquisitions by requiring memoranda of understanding between local governments and the tribal applicants, effectively giving localities veto authority over trust acquisitions.

- A. What role do you believe is appropriate for state and local governments to play in a tribe's economic development vis-à-vis the land into trust process?
- B. Please state the bases of authority—contained within the Indian Reorganization Act or elsewhere in law—that authorizes Interior to elevate the concerns of states over that of tribes.

**Response:** Because I am not currently at the Department, I would need to review the current land into trust procedures and process, if confirmed.

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**Question 29: Tribal Energy**

As the Department of Energy laid out during a recent Tribal Energy summit, the potential for renewable energy in Indian Country is enormous. While reservations account for 2% of the nation's land mass, they hold 5% of the nation's potential renewable energy resources. The Department of Energy also estimates that wind power from tribal lands could satisfy 32% of the total U.S. electricity demand. And solar production from Indian lands could generate enough energy to power the country two times over.

We've also heard from the GAO that the Department of the Interior is turning its attention to conventional fossil fuels for development, this despite the upward trajectory of renewables.

What role do you think renewable energy should play in energy development in Indian Country?

**Response:** I believe it can play a significant role. The Secretary has made it one of his highest priorities that tribes should be able to make their own decisions regarding what type of resource development, including renewable energy, will best benefit each individual tribe. I support the President's and the Secretary's goals.

**Question 30: Tribal Gaming**

While you were with the Department of the Interior, the agency implemented a number of sweeping regulatory changes that had the effect of slowing down gaming approvals. Yet the Indian Gaming Regulatory Act provides tribes, states, and the surrounding counties with billions of dollars nationally.

**A. Do you intend to seek changes to implementation of the Indian Gaming Regulatory Act, either by regulation or through official or unofficial agency guidance??**

**Response:** Because I am not at the Department, I cannot speak to the Department of the Interior's plans on this matter or whether changes might be considered for this program.

**B. Do you commit to engaging in meaningful consultation with tribes on any changes this Department makes to how it implements the Indian Gaming Regulatory Act?**

**Response:** As I have indicated previously, I support consultation.

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**Question 31: Federal Recognition**

The Executive branch has recognized tribes through executive orders and other federal action for more than a century, and Interior first promulgated regulations on this process more than forty years ago, in 1978. Federal recognition is extremely powerful: it allows a tribe to exercise its sovereign status on equal footing with states, with the full panoply of associated rights, such as the right to tax and assert civil and criminal jurisdiction. Also with federal recognition comes eligibility for federally-funded services such as health care and housing assistance. Given the importance of the decision to recognize a tribe, Interior has put in place a process intended to be free of political considerations.

As Deputy, what steps will you take to ensure the process is free from political interference?

**Response:** I am not familiar with the current state of the federal recognition process and will examine the current regulations, visit with career staff, and meet with you to discuss appropriate steps.

**Question 32: Coal self-bonding**

A significant number of coal companies filed for bankruptcy last Congress. These bankruptcies highlighted the fact that federal and state coal reclamation performance bonding requirements are inadequate. In response, the Department took important steps to begin address its financial assurance rules under the Surface Mining Control and Reclamation Act, including implementation by states of those rules. Earlier this year, the GAO concluded that across a range of federal energy and natural resources, coal alone benefits from being able to “self-bond” in order to meet reclamation performance requirements.

Will you commit to continuing the Department’s important work to reform the financial assurance rules for coal in light of lessons learned from the recent slate of bankruptcies?

**Response:** I am not familiar with the current status of the Department’s financial assurance regulations under the Surface Mining Control and Reclamation Act. If confirmed, I will commit to becoming better acquainted with the issue.

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**Questions from Senator John Barrasso**

**Question 1: Among the Obama Administration's particularly harmful regulations is the Bureau of Land Management's "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule regarding venting and flaring of methane on federal and Indian lands. I believe this rule is unnecessary, costly, and duplicative of existing state and federal regulations. Please explain the steps you will take to address this rule and similar duplicative rules, and to prevent future duplicative regulations from being issued.**

**Response:** I have not yet had any substantive interaction with the Department on implementing the President's America First Energy Plan. However, closely examining regulations to eliminate those that are duplicative and burdensome will be a start. A brighter future depends on energy policies that stimulate our economy, ensure our security, and protect our health.

**Question 2: In Wyoming, there are plans underway to expand surface water storage capacity. For too long, the permitting review process at the Department of the Interior has proven to be more timely and costly than necessary. This uncertainty threatens project funding and completion. If confirmed, will you commit to improving and streamlining the process to insure that timely communications with applicants occur and decisions on water storage facility permits are made?**

**Response:** If confirmed, I will look into this matter. I recognize the need to streamline and expedite the consideration of water storage projects, as these projects have the potential to provide numerous benefits, including reliable water supplies, flood control, hydropower, and water quality improvements.

**Question 3: Permitting on federal lands frequently requires mitigation of some kind. The Obama Administration took many liberties with the concept of mitigation, including issuing a revised Department-wide strategy and suggesting that advanced mitigation should be the future standard. What guidance would you give the Department to ensure there are clear, consistent guidelines for mitigation in the future?**

**Response:** If confirmed, I would work to ensure that program authorizations are examined to confirm whether the Department's legal mandates establish when and how mitigation could be charged, along with appropriate sideboard.

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**Question 4: What roles do you believe public land and private land/private investment should have in the future of mitigation, and are these roles different?**

**Response:** I want to ensure that the Department's actions regarding on or off site mitigation requirements are well grounded in the law, if confirmed I will review the Department's statutes and regulations and discuss the matter with Secretary Zinke before offering an opinion.

**Question 5: While the Forest Service is housed in the Department of Agriculture, cohesive and coordinated management between the Forest Service and the Department of Interior is critical in addressing the risk of catastrophic wildfire. How would you work with Secretary Perdue, and staff at the Department of Agriculture to improve forest and fire management on multi-agency fires?**

**Response:** I agree that maximizing coordination between the Department of the Interior and the Department of Agriculture on multi-agency fires is an important approach, and if confirmed I will support pursuing ways of improving cohesive and coordinated fire management between the agencies.

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**Questions from Senator Ron Wyden**

**Question 1:** On Secure Rural Schools, I expect you to be engaged and helpful in getting a long-term solution on this important issue. As you know, I coauthored the original Secure Rural Schools bill because counties were struggling, and it is just as important today as it was then. Faced with continued budget shortfalls, rural counties are forced to make difficult cuts to libraries, schools, and infrastructure projects, and do more with less. I understand that many of my colleagues will need to see forest management reforms as part of any long-term SRS solution. I want to be clear that I take a back seat to no one when it comes to tackling tough forestry issues, including increasing timber harvest, which is what my O&C bill did. But it must be done in a sustainable way that does not stomp on our bedrock environmental laws. Tying the well-being of rural economies to unsustainable logging levels is a dead-end, leading the counties to exactly the same gridlock they are facing now while depleting our nation's forests.

**Mr. Bernhardt, short-term reauthorizations of SRS are simply not adequate for rural counties working to manage budgets each year. Will you commit to working with Congress towards a long-term solution for SRS?**

**Response:** Yes, I will commit to working with you and other Members of Congress on the issue.

**Question 2:** I have long said that land management decisions are best made through a deliberative process that includes broad stakeholder engagement and thorough consideration of local concerns. Recently there have been reports that the Department has suddenly postponed meetings of Resource Advisory Councils (RACs) until September. RACs are a great example of bottom-up land management, and should serve as a model for stakeholder engagement.

**As Deputy Secretary, what steps will you take to ensure local voices, including RACs, have opportunities to provide input and take part in the process at all times, not just when those local voices align with the goals of the administration?**

**Response:** Like you, I believe collaboration and listening to varied views are important. I would need to learn more about the specific issues here to have specific steps to recommend.

**Question 3:** I was very disappointed to see the President's Executive Order calling for a review of national monument designations and to learn that Secretary Zinke will be reviewing the Cascade-Siskiyou National Monument's recent expansion. The original monument designation in 2000 and its expansion both received significant and broad local support, and the public was given the opportunity in both designations to be a part of the process.

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**As Deputy Secretary, what will be your role in reviewing and evaluating monuments?**

**Response:** If confirmed, I do not know if I will have any role in this process.

**Will your review of monument designations ensure the overwhelming public support for monuments like Cascade-Siskiyou are respected, even if that public support is in opposition to the Administration's goals?**

**Response:** I believe that where a monument has the support of its local community, state, and congressional delegation, the Administration would be wise to listen to such consensus.

**Question 4:** Mr. Bernhardt, the Department of the Interior's Land Buy-Back Program for Tribal Nations implements the land consolidation component of the *Cobell* Settlement, a component that provided \$1.9 billion for tribes to consolidate tribal homelands. This program is vital for the economic development of Tribal communities across the United States, works to promote self-sufficiency, and is a necessary step in repairing years of injustice committed against Tribes in Oregon and throughout the United States.

**The Administration recently sent a letter to tribal leaders on May 9 of this year, in which the Administration expressed its intent to undertake a "brief strategy review period" regarding this important program. Please walk me through how you intend to implement the Buy-Back Program.**

**Response:** I am not aware of the letter, and I have limited knowledge of this program. If confirmed, I would be happy to learn more about the issue and meet with you.

**Should the Department of Interior propose changes to the Buy-Back Program, how will Interior ensure Tribes are provided opportunities for meaningful input?**

**Response:** As I indicated in the previous response, I am not aware of the letter, and I have limited knowledge of this program. If confirmed, I would be happy to learn more about the issue and meet with you.

**What do you believe are appropriate steps the Department of the Interior should take to address the issue of fractionalization once the Buy-Back program exhausts the fund?**

**Response:** I have limited knowledge of this program. If confirmed, I would be happy to learn more about the issue and meet with you.

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**Question 5:** Recreational, commercial, and tribal fishing groups in Oregon are very concerned about how water allocation will affect salmon and steelhead runs, especially in the Klamath river basin. In fact, due to extremely low numbers of Chinook salmon returning to the Klamath drainage, the Pacific Fisheries Management Council closed entire salmon fishery south of Humbug Mountain to Eureka, CA for the entire 2017 season.

**Citing your previous work for the Westlands Water District and the risk that excess pumping of water during drought years poses to both endangered species as well as fishermen reliant on adequate river flows, how will you balance the needs of agro-businesses with those of the fishing community and the environment?**

**Response:** First, I will follow my recusals. That said, I will enter questions with an open mind. More important, if appropriate, I would be interested in meeting with your constituents, who are concerned, to learn more about their perspective, their concerns, and the impact these closures have on them, and their suggested solutions.



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Questions from Senator Bernard Sanders

**Climate change**

**Question 1: President Trump has suggested in the past that climate change is a hoax. Is the President correct? Is climate change a hoax?**

**Response:** As I indicated at the hearing, I believe that man is an influence on climate change.

**Question 2: Do you agree with the vast majority of scientists that climate change is real, it is caused by human activity, and that we must aggressively transition away from fossil fuels toward energy efficiency and sustainable energy like wind, solar, and geothermal?**

**Response:** As I indicated at my hearing, I believe that man is an influence on climate change. I agree we need to produce renewable energy.

**Question 3: Do you agree with the vast majority of scientists that the combustion of fossil fuels contributes to climate change?**

**Response:** Yes.

**Question 4: Do you believe that the Department of the Interior has a role in reducing the extraction and use of fossil fuels?**

**Response:** I am not aware that Congress has ever provided that direction to the Department of the Interior.

**Question 5: If confirmed, how will you work to address climate change?**

**Response:** I will work to understand it better and pursue adaptive management strategies, as appropriate.

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**Congressional Relations**

**Question 6: While you were the Director of Congressional Relations for the Department of the Interior under President George W. Bush, you took the position that you did not need to be responsive to Democratic Congressional Members and Staff. Do you commit that, if confirmed, you will respond to all relevant inquiries from all Members of Congress, regardless of party or position?**

**Response:** I do not believe your depiction is accurate. The Department itself needs to carefully weigh every request from Congress and insure it is meeting the needs of Congress to ensure harmonious relationships with you and this committee. As I stated in my 2006, my personal view is that the Department of the Interior needs to provide full disclosure to Members of Congress, subject to the Department of Justice's guidelines. In 1998, the Chief of Staff for the Secretary of the Interior promulgated guidance for the Department and stated in that guidance that was to treat requests from individual members under FOIA. Since that time, I have reviewed the Department of Justice's guidelines and I think that the Department's 1998 guidance missed a number of caveats that were contained within the Department of Justice guidelines.

**Question 7: If confirmed, do you commit to assuring staff in the Office of the Secretary, including the Office of Congressional and Legislative Affairs, will respond to all relevant inquiries from all Members of Congress, regardless of party or position?**

**Response:** I expect the Office of Congressional and Legislative Affairs to make its best efforts to do so.

**Conservation Cooperatives**

**Question 8: In Vermont, the North Atlantic Landscape Conservation Cooperative and University of Vermont's Cooperative Fish and Wildlife Research Unit provide critical scientific information used by natural resource managers, communities, and citizens. Do you support these types of programs, and if so, how will you ensure they are strengthened at the Department of Interior?**

**Response:** As I indicated at the hearing, the Department and its bureaus should base decisions on available science. Regarding the specific programs that you mention, I would need to learn more about them to provide a meaningful response to this question.

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**Energy Policy**

**Question 9: What are the policy implications of the President's America First Energy Plan for the Department of Interior? How will you implement the plan?**

**Response:** Greater energy independence. If confirmed, I look forward to helping the Secretary implement the President's vision, and to engaging in policy discussions and implementation efforts.

**Endangered Species Act**

**Question 10: In the past, including during your testimony to the House Natural Resources Committee on April 19, 2016, you advocated for weakening protections for critical habitat of endangered species. If confirmed, will you continue your earlier efforts to roll back critical-habitat protections for imperiled species?**

**Response:** I did not advocate weakening protections for critical habitat of endangered species. Instead, my testimony advocated following the law. If confirmed, my focus in recommending decisions pertaining to critical habitat and ESA implementation will be on minimizing conflict and controversy associated with the Act in a manner that is consistent with the law.

**Question 11: As Solicitor at the Department of the Interior, you authored a controversial opinion, "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of its Range,'" that was widely criticized by scientists for its failure to grasp the biological realities of extinction and whose central premise was rejected by multiple courts. Do you stand by the assertions made in the opinion? If confirmed, will you continue in your earlier efforts to curtail conservation measures that seek to protect and recover endangered species throughout their geographic range?**

**Response:** My efforts to address the meaning of the phrase "*all or a significant portion of its range*" had nothing to do with any effort of curtailing conservation measures. Instead, it had everything to do with helping the U.S. Fish and Wildlife Service develop a policy that might withstand legal review. The laws in our country are written not by a council of scientists but by Congress, and sometimes the agencies struggle within them. I think it is possible I will need to continue my review of these issues because on March 28<sup>th</sup> of this year, a federal district court vacated and remanded the Obama Administration's "Final Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's Definitions of 'Endangered Species' and 'Threatened Species,'" 79 Fed. Reg. 37,578 (July 1, 2014), as it considered the agency's decision related to the pygmy owl. In that case, the court explained that the Obama's administration's

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... interpretation set forth in the Final SPR Policy impermissibly clashes with the rule against surplusage and frustrates the purposes of the ESA. *Cf. Pac. Nw. Generating Coop*, 580 F.3d at 812. Accordingly, it is not a permissible administrative construction of the ESA's SPR language. The Final SPR Policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA. 5 U.S.C. § 706(2)(A).

It is my view that my opinion's central premise was that in this phrase "*all or a significant portion of its range*" the word "significant" could not have the same meaning as the word "all", which should be obvious.

**Question 12: In regard to the implementation of the Endangered Species Act, do you support designating critical habitat for species, and do you believe these decisions should be based on the best scientific data available?**

**Response:** I support faithfully executing the laws that have been enacted and, if confirmed, this will include actions under the Endangered Species Act. As I indicated at the hearing, decisions should be based on sound science, however, the inclusion of section 4(b)(2) of the act also specifically provides the Secretary the authority to exclude certain areas from designation under certain conditions.

**Question 13: Do you support Fish and Wildlife Service guidelines to ensure that science is the driving force behind Endangered Species Act implementation?**

**Response:** As I indicated at the hearing, decisions should be based on sound science and fall within the rubric of applicable law. I am not certain what specific guidelines your question refers to.

**Question 14: Do you support relying on independent scientists with relevant expertise to evaluate and review the data that the Fish and Wildlife Service uses when making decisions related to the implementation of the Endangered Species Act?**

**Response:** As I stated at my hearing, my view is that policy decisions should be predicated on the evaluation of science and application of the law. This view applies to my approach to ESA implementation. I believe when scientific data is evaluated on its merits and used as an information base to make policy decisions that are honest to the science, conflicts will likely be reduced and those decisions will be reliable and legally sound.

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**Question 15: Are you confident that the current process for selecting contractors and independent scientists to conduct scientific peer reviews related to the implementation of the Endangered Species Act sufficiently guards against political bias, and/or the appearance of political bias? Why or why not?**

**Response:** I am not sufficiently familiar with the current process for selecting peer reviewers and would need to learn more about the program to provide a meaningful response to your question.

**Question 16: Based on your interpretation of the Endangered Species Act and Department of the Interior policies, what are the requirements for consultation with federally recognized Native American tribes in making rulings under the Act?**

**Response:** If confirmed, I would need to evaluate the Department's current policies on consultation prior to offering my interpretation. That said, as I have stated previously I believe in consultation and need to balance consultation within the confines of the Act.

**Question 17: How could the Department of the Interior's consultation with Native American tribes concerning Endangered Species Act enforcement be improved?**

**Response:** As I am not at the Department nor up to speed on existing consultation policies, I would need to review those materials, if confirmed.

**Fisheries**

**Question 18: Many fish populations in both marine and freshwater environments are threatened. What actions would you take to address these issues?**

**Response:** As a fisherman and former member of the Board of Game and Inland Fisheries for the Commonwealth of Virginia, I am sensitive ecological and economic value of our nation's fish populations. Much of my career has focused on finding durable solutions to the many challenges associated with threatened and endangered species recovery through the lens of the ESA both from public and private sector perspectives. Should I be confirmed, I would apply this experience and the knowledge gained through it to making recommendations that comport with the law and advance Secretary Zinke's conservation agenda.

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**Question 19: What additional actions should Department of the Interior take to prevent invasive Asian carp from invading the Great Lakes and potentially destroying the ecosystem?**

**Response:** I recognize the risk to the Great Lakes associated with the introduction of Asian carp and, if confirmed, I look forward to evaluating ongoing activities at the Department to prevent, detect and control Asian carp in order to protect the Great Lakes.

**Question 20: Will you support full funding of fisheries management activities that result in many hundreds of millions of dollars flowing through the recreational sector of the United States economy?**

**Response:** As a fisherman and former member of the Board of Game and Inland Fisheries for the Commonwealth of Virginia, I am keenly aware of the ecological and economic value of effective and informed fishery management as well as its importance for subsistence to Alaska communities. I know the U.S. Fish and Wildlife Service, working with state and local governments and other partners, maintains a network of fisheries that spans the country. Should I be confirmed, I commit to working with Secretary Zinke, the Administration, and the Congress to facilitate appropriate funding for fisheries consistent with the President's budget and priorities.

**Question 21: What are your specific priorities for the management of the Great Lakes and Lake Champlain fisheries?**

**Response:** My view is that effective resource management decisions hinge on sound science applied within the contours of the law. Within this framework, my priorities will be to advance Secretary Zinke's conservation agenda in a manner that is rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes.

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**Fossil Fuels**

**Question 22:** According to recent studies, the quantity of federal fossil fuels already under lease exceeds the amount that can be burned and still meet our commitments to reduce domestic greenhouse gas emissions, keeping average global temperature below 2 degrees Celsius. The Department of the Interior is responsible for managing fossil fuel development on public lands and waters. Would you take action to ensure federal fossil fuel leasing decisions are consistent with our national and international climate commitments? Do you support a moratorium on fossil fuels extraction on federally-owned public lands and waters?

**Response:** I am a believer in an all-of-the-above energy strategy and, if confirmed as Deputy Secretary, I would support the Secretary's efforts to foster responsible development of wind, solar, hydro, coal, oil, and natural gas on federal and tribal lands.

**Question 23:** President Trump campaigned on the promise of bringing the coal industry back and restoring thousands of coal jobs. Many economic and policy analysts agree that the decline in coal production has more to do with the increase in natural gas production than environmental regulations. What is your assessment?

**Response:** The Energy Information Administration has projected that coal will remain an important part of the American fuel mix for decades.

**Question 24:** What role do you think the Department of the Interior can play in transitioning our country away from fossil fuels?

**Response:** The role of the Department of the Interior is to make energy resources on federal lands available for development, as appropriate; it is not to select winners and losers among energy sources.

**Question 25:** Will you encourage wind and solar generation on lands managed by the Department of the Interior?

**Response:** I support an all-of-the-above energy approach, which includes wind and solar.

**Question 26:** Do you agree that there are places that are too unique, either for historical, cultural, environmental, wildlife, or similar reasons, to open up to fossil fuel development?

**Response:** Yes, along with other important factors, the characteristics your question references are among those it is appropriate to consider when making decisions about where and how development takes place.

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**Question 27:** President Obama withdrew significant portions of the Arctic and Atlantic Oceans from oil and gas development. The reasons he cited for this action include the irreplaceable value of these waters for Indigenous, Alaska Native, and local communities' subsistence activities, economies, and cultures; protection of wildlife and wildlife habitat; promotion of scientific research; and the vulnerability of these ecosystems to an oil spill, which would present significant logistical, operational, safety and scientific challenges for extraction and spill response. In addition, President Obama noted that by the time oil production could begin in these areas, our nation needed to be well on our way to transitioning to clean, renewable energy sources.

In President Trump's Executive Order of April 28, 2017 on Offshore Energy Strategy for the Five Year Offshore Leasing Program, President Trump modified President Obama's withdrawal, and opened these areas for leasing consideration. This Executive Order directs the Department of the Interior to review the Five Year Offshore Leasing Program. **Notwithstanding DOI's statutory requirement to analyze all available leasing areas, if confirmed, will you commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas commensurate with those provided by the Obama Administration?**

**Response:** Because I am not at the Department, I am unaware of the details regarding the ongoing review of the Five Year Offshore Leasing Program.

**Question 28:** The Gulf of Mexico and Gulf Coast communities are on the front lines of climate disruption and fossil fuel extraction. Many communities, primarily low-income and communities of color, suffer daily from environmental injustices related to the fossil fuel industry. If confirmed, would you support action to extend or make permanent the drilling moratorium in the Eastern Gulf of Mexico? If confirmed, will you commit to further action to phase out fossil fuel development and promote a just transition to a clean, renewable energy-based economy along the Gulf Coast?

**Response:** I am committed to the president's energy plan.



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**National Heritage Areas**

**Question 29:** Congressionally designated National Heritage Areas (NHAs) are special places where natural, cultural, historic, and recreational resources combine to form a distinctive landscape arising from patterns of human activity shaped by geography. All NHAs tell nationally important stories through the physical features of the area and the traditions that have evolved within them. Each of the 49 NHAs in the United States is governed by separate authorizing legislation and operates under provisions unique to its resources and desired goals. As Deputy Secretary of the Interior, will you continue to support National Park Service's National Heritage Area program?

**Response:** Yes. I understand that National Heritage Areas have provided many positive benefits to local communities.

**Question 30:** All NHAs interpret and highlight nationally important stories. Heritage areas are representative of the national experience through both the physical features that remain and the traditions that have evolved within them. In recent years, funding to these heritage areas have been unequally distributed with older heritage areas receiving twice the amount of \$300,000 awarded to heritage areas created after 2006. If confirmed, will you support equal funding among all NHAs, so that decade-old heritage areas might start to meet their potential?

**Response:** If confirmed, I commit to working with Secretary Zinke, the Administration and the Congress to ensure appropriate funding consistent with the President's budget and priorities.

**Question 31:** If confirmed, will you defend the National Heritage Area program against unwarranted and harmful budget cuts?

**Response:** Again, if confirmed, I commit to working with Secretary Zinke, the Administration and the Congress to advocate for appropriate funding consistent with the President's budget and priorities.

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**National Monuments**

**Question 32: The 1906 Antiquities Act allows the president to proclaim “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States” to be national monuments. At his nomination hearing, Secretary Zinke said of rescinding a national monument, “legally, it’s untested.” Do you believe that the President has the legal authority to overturn an existing national monument designation?**

**Response:** As I noted during the hearing, the exercise of the President’s authority under the Antiquities Act is a matter that will be evaluated by the White House Counsel. As I also noted, I am familiar with conflicting legal opinions interpreting the President’s authority under the Antiquities Act but, again, this is a matter for the White House to decide.

**Question 33: Earlier this month, the Department of the Interior revealed its list of National Monument designations that it would review under Executive Order 13792 to determine whether each designation or expansion conforms to the policy set forth in 82 FR 20429, Section 1. This section states that designations should “appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.” How will you instruct the Department to balance these considerations in conducting the designation reviews?**

**Response:** If confirmed, I do not know what role, if any, I will have in the monument designation review that is currently underway at the Department.

**National Parks**

**Question 34: Do you believe we should privatize the National Parks Service?**

**Response:** No. I believe that our parks are our national treasures and should serve and inspire all Americans.

**Question 35: How would you describe the economic and environmental value of the National Parks?**

**Response:** National parks provide many tangible economic benefits to our economy and to local communities, benefits that I observed growing up in a small town in Colorado.

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**Question 36: If confirmed, how will you initiate policy reforms to make the National Parks more accessible and relevant to communities of color, low-income families and people with disabilities?**

**Response:** If confirmed, I will work with the Secretary and Congress to ensure that our parks serve and inspire all Americans.

**National Wildlife Refuges**

**Question 37: How will you ensure that our National Wildlife Refuges are adequately maintained for the benefit of current and future generations of Americans?**

**Response:** As a sportsman, I understand and appreciate the importance of fish and wildlife conservation. I have applied this stewardship ethic throughout my career, from my time at Interior to my service on Virginia's Board of Game and Inland Fisheries. Should I be confirmed, I will continue my commitment to working with a wide array of stakeholders and partners, in particular states and local communities, to find solutions to conflicts; to advance Secretary's Zinke's agenda for conservation stewardship; to improve game and habitat management; and to increase outdoor recreational opportunities for this and future generations.

**National Scenic and Historic Trails**

**Question 38: Will you commit to protecting National Scenic and Historic Trails lands from fossil fuels and mineral extraction?**

**Response:** I will commit to looking into the issue. I am in agreement with Secretary Zinke that development can and should be conducted in accordance with the principles of multiple use. If confirmed, I will work with the Secretary to find a balance for all uses, including hunting, fishing, hiking, and other forms of recreation, which play an important role on public lands.

**Question 39: Will you commit to preventing fossil fuel pipelines from crossing National Scenic and Historic Trail systems?**

**Response:** I am in agreement with Secretary Zinke that development can and should be conducted in accordance with the principles of multiple use. If confirmed, I will work with the Secretary to find a balance for all uses, including hunting, fishing, hiking, and other forms of recreation, which play an important role on public lands.

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**Question 40: National Scenic and Historic Trails drive local recreation economies. What is your plan for ensuring that National Park Service funding is sufficient to maintain critical trail infrastructure such as trails, shelters, and bridges?**

**Response:** If confirmed, I commit to working with the Secretary, the President, and Members of Congress to address the many infrastructure needs of our communities.

**Public Lands**

**Question 41: Under what conditions do you believe it is appropriate to transfer federal lands to private ownership?**

**Response:** I share Secretary Zinke's opposition to the sale or wide scale transfer of federal lands. As the Secretary offered in his written responses to this Committee, "...there are some situations in which commitments have previously been made, inholdings need to be swapped or exchanged, or land banks are well situated to address the needs of growing urban areas, where limited transfer is appropriate." I would need to review such proposals before making any decisions.

**Question 42: Under what conditions do you believe it is appropriate to transfer federal lands to state ownership?**

**Response:** As I stated above, I support Secretary Zinke's commitment to federal lands.

**Question 43: You have a long career advocating and/or lobbying for big oil, gas, coal and mining corporations that operate on public lands. How can you be effective in protecting federal public lands when you will have to recuse yourself from so many of these issues?**

**Response:** I can be effective protecting public lands. For example, I resolved contentious claims on the Black Canyon of the Gunnison, protecting the National Park's assets. I believe that public trust is a public responsibility, and believe maintaining an ethical culture is important. I will fully comply with the ethics agreement I signed. Moreover, it is not my experience that the primary focus of the chief operating officer of the Department of the Interior is directed at particular matters involving specific parties, but rather larger policy and organization issues. In addition, for the duration of my service, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. Finally, I will install a robust screening process, should one not exist within the office.

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**Question 44: If confirmed, how will you address issues of inequality in access to public lands?**

**Response:** Secretary Zinke and I both believe public lands should be available for the enjoyment of all. If confirmed, I look forward to working with the Secretary to increase recreational access to public lands.

**Question 45: How would you describe the economic and environmental value of public lands?**

**Response:** Having grown up in a small town in Colorado, I understand firsthand the economic impact our public lands have on local communities across the country. From energy development to recreational access, these lands offer invaluable resources to locals and tourists alike.

**Question 46: According to the Outdoor Industry Association, the outdoor recreation economy generates \$887 billion in economic activity and 7.6 million American jobs. The association claims that it is a stronger economic sector than oil and gas, motor vehicles and accessories, and pharmaceuticals. Do you concur with this economic assessment? Does the economic significance of outdoor recreation affect your support for maintaining public lands for recreation purposes in contrast to other uses?**

**Response:** I grew up in Colorado, where some communities benefitted significantly from an outdoor recreation economy. Access to federal lands creates jobs and bolsters local economies, so I believe there is great merit in supporting these opportunities for quality access.

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**Land and Water Conservation Fund**

**Question 47:** Created by Congress in 1965, the Land and Water Conservation Fund (LWCF) was a bipartisan commitment to safeguard natural areas, water resources and our cultural heritage, and to provide recreation opportunities to all Americans. National parks like Rocky Mountain, the Grand Canyon, and the Great Smoky Mountains, as well as National Wildlife Refuges, national forests, rivers and lakes, community parks, trails, and ball fields in every one of our 50 states were set aside for Americans to enjoy thanks to federal funds from the Land and Water Conservation Fund (LWCF). The LWCF is critical to the protection and preservation of the many landscapes that drive the \$887 billion outdoor recreation economy.

**Question 48:** The Administration's "skinny" budget included a direct attack on federal land conservation, proposing to drastically slash funding for this bipartisan priority. The temporary extension of the LWCF expires September 30, 2018. If confirmed, will you support the LWCF, and continuing to expand public access to parks, forests and trails?

**Response:** Since 1965, the LWCF has been a successful program that has benefitted both Vermont and my home state of Colorado. It has my support and the support of Secretary Zinke. Should I be confirmed, I look forward to working with you and your colleagues to reauthorize the program.

**Question 49:** The LWCF makes incredibly important investments in my state, protecting federal units like the Appalachian Trail and the Conte National Fish and Wildlife Refuge and working in public-private partnership through the Forest Legacy Program to preserve working forests and keep jobs in the woods. If confirmed, will you commit to supporting permanent reauthorization and full, dedicated funding of this program, as Secretary Zinke did in his confirmation hearing?

**Response:** I share Secretary Zinke's support for the LWCF and look forward to working with you and your colleagues to reauthorize the program.

**Question 50:** Natural and recreational infrastructure is critical to clean water, healthy families, safe neighborhoods and continued growth and jobs in our extremely productive outdoor recreation economy. Our National Parks and public lands are in need of continued investment in conservation as well as maintenance. Do you agree that the LWCF represents an infrastructure investment necessity that drives economic production, growth, and employment in America every bit as much as do road and bridge construction, water resource development, and other public works projects?

**Response:** Our public lands and national parks hold some of our nation's greatest treasures. As I said at my hearing, I grew up surrounded by public lands and know the many benefits

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they have to offer. The outdoor industry is an integral part of our economy. Should I be confirmed, I will continue to support programs like LWCF that incentivize and preserve necessary investments in outdoor and recreational opportunities.

**Question 51: Should you be confirmed, will you commit to an annual budget that allocates all of the annual \$900 million from the LWCF account to the programs identified by Congress each year in the appropriations bill?**

**Response:** The LWCF has my support and should I be confirmed I look forward to working with you and your colleagues to protect and bolster this important program. As a native Coloradan and outdoorsman, I have seen the good work LWCF does for local communities, sportsmen, recreationists, and conservation as a whole. As the budget process moves forward, I look forward to working with President Trump, Secretary Zinke and Congress to support LWCF's critical work.

**Science**

**Question 52: While you were with the Department of the Interior, there were allegations that you manipulated scientific data for political outcomes. In order to protect scientific integrity, the Department of the Interior created a Scientific Integrity Policy, which all career, political, and contract employees must adhere. There are now designated Scientific Integrity officers, who are career employees in each bureau to review and adjudicate any discrepancies. Do you commit to maintaining this policy?**

**Response:** As I indicated at my hearing, I did not manipulate scientific data. I am not yet familiar with this policy, but I agree that scientific integrity should underpin agency actions.

**Question 53: Do you commit to respecting all decisions that come from these Scientific Integrity Officers?**

**Response:** I will support decisions, but I will not support arbitrary or capricious decisions, so I cannot say yes to all decisions.

**Question 54: Do you commit to personally signing the Scientific Integrity Policy, and sharing with this committee a copy of that document?**

**Response:** As I indicated in response to a previous question, I am not yet familiar with this policy, but I agree that scientific integrity should underpin agency actions.

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**Tribal Issues**

**Question 55:** Indian Affairs is the oldest bureau of the Department of the Interior. Throughout history and even today, the United States government has treated the Native American people with disrespect, abrogating treaty obligations and its trust responsibility. As a result, there are Native American communities living in unbelievable poverty with high unemployment rates and unspeakably high youth suicide rates. Do you agree with these assertions? If so, what do you propose to do at the Department to improve life for the Native American people throughout this country?

**Response:** Secretary Zinke and I both believe the Department of the Interior has an important trust responsibility in Indian Country. If confirmed, I look forward to working with him to promote tribal sovereignty and self-determination.

**Question 56:** The federal government's moral and legal obligations to tribes in light of the trust responsibility carry immense moral and legal force. This trust relationship serves as an underlying basis for tribal consultation, the process by which the government engages in a meaningful, good-faith dialogue with all tribes. The Department of the Interior, by virtue of its role in Native American affairs, plays a prominent part in how the government engages in tribal consultation.

In the wake of the Dakota Access Pipeline, three federal agencies, including the Department of the Interior, published a report in January 2017 entitled, "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions." The subject of months-long consultation across Indian country, this report sets forth a number of recommendations to improve the process for permitting and infrastructure development. What steps do you intend to take to incorporate this report into the agency's decision-making process?

**Response:** I am not familiar with the January 2017 report and therefore cannot comment on its proposals. I do share Secretary Zinke's commitment to building and maintaining mutual trust among tribes to build consensus on infrastructure or permitting issues.



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**Question 57:** As the Department of Energy laid out during a recent Tribal Energy summit, the potential for renewable energy in Indian Country is enormous. While reservations account for 2% of the nation's land mass, they hold 5% of the nation's potential renewable energy resources. The Department of Energy also estimates that wind power from tribal lands could satisfy 32% of the total U.S. electricity demand. And solar production from Indian lands could generate enough energy to power the country two times over. Nevertheless, the Department of the Interior is turning its attention to conventional fossil fuels for development, this despite the upward trajectory of renewables. What role do you think renewable energy should play in energy development in Indian Country?

**Response:** Similar to the President and Secretary Zinke, I support an all-of-the-above energy approach, which includes renewable energy. There are tribes that choose not to develop energy resources, and I agree with the Secretary that we must respect that position, which is a true reflection of tribal sovereignty.

**USGS and Water**

**Question 58:** If confirmed, how will you support critical water information services including the United States Geological Survey (USGS) water-gauging infrastructure?

**Response:** Yes.

**Question 59:** Please describe your approach to ensuring that USGS matching funds used to complement state- and locally-sponsored water measurement gauges and associated information technology are not diverted to other Agency activities.

**Response:** Generally, collaboration among our local and State partners benefits Interior. I am not currently at the Department and cannot offer further insight until briefed, if confirmed.

**Wild horse management**

**Question 60:** Do you have plans to change or modify the Bureau of Land Management's wild horse management plan? If so, what changes would you recommend?

**Response:** I intend to work with Congress on finding a solution to this problem.

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Questions from Senator Al Franken

**Question 1:** I understand that under the new Administration the Department of Interior is undertaking a brief review of Cobell buy-back program strategies. It is also my understanding that the Department has made commitments to a number of tribes, including the Leech Lake Band of Ojibwe and other tribes in Minnesota, that they will be included in the next round of implementation. Should you be confirmed, would you be in a position to ensure a quick review of implementation strategies and ensure that the commitments made to tribes on this matter be maintained?

**Response:** Because I am not at the Department, I do not know if I will have any role in this process.

**Question 2:** Restoring tribal homelands rebuilds tribal land bases and strengthens the relationship between tribes and the federal government. It also makes administering justice and engaging in economic development easier by reducing checkboard landholdings. During your time at the Department of the Interior, many tribes were of the opinion that the Department had imposed what was essentially a moratorium on land into trust acquisitions.

- a. Can I get a commitment from you that your Interior Department will not put in place a land into trust moratorium?
- b. If you cannot make the commitment requested in part (a), would you at least commit to a transparent process that prioritizes meaningful consultation with tribes and tribal organizations—on an open and fair basis—so their voices can be heard on any proposed changes to Interior's land into trust procedures?
- c. Can you please share your views on the importance the Administration will place on the land to trust process?
- d. In 2008, the Department of the Interior, through then-Assistant Secretary Carl Artman, finalized guidance for restricting land to be taken into trust related to gaming. Yet the Department did not consult with tribes in drafting this guidance. Can I get a commitment from you that the Interior Department will consult with tribes on a government-to-government basis when developing any additional guidance or regulations as it pertains to land into trust acquisitions?

**Response:** As I indicated in the hearing, I take consultation seriously and commit to consult with tribes on a government-to-government basis. I am not at the Department and therefore am unaware of the Administration's current work on the land into trust process. If confirmed, I will need to be briefed on the state of land into trust procedures, and after that I would be happy to visit with you or your staff.

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**Question 3:** If you are confirmed as Deputy Secretary of the Interior, you will be responsible for overseeing the Bureau of Indian Affairs (BIA). With the multitude of problems in Indian Country today, from disturbingly high rates of youth suicide to a lack of sufficient economic opportunity and many others, we need a bipartisan commitment to address the living conditions on tribal lands. One of the most frustrating issues with the BIA has been the chronic underfunding of important programs and general lack of support from the federal government.

- a. As Deputy Secretary of the Interior, would you advocate for strong funding for federal programs that support American Indians?**

**Response:** As we discussed in your office, I know this is an issue you care about and so do I. I am committed to working with you to find ways to address these chronic challenges in Indian country.

- b. Do you have a timeline for filling BIA positions?**

**Response:** No, I am not aware of a timeline.

- c. Will you expand on your ideas for improving living conditions in Indian Country?**

**Response:** See my response to question 3a, above.

**Question 4:** As we discussed at the hearing, the federal government has moral and legal obligations to uphold its treaty and trust responsibilities to Native Americans and engage with tribes on a government-to-government basis. This government-to-government relationship is the basis for tribal consultation, the process by which the United States engages in a meaningful, good-faith dialogue with tribes. The Department of the Interior, by virtue of its role in Native American affairs, plays a prominent part in how the government engages in tribal consultation.

- a. You stated that you would “unequivocally commit” to consult with tribes. Yet as a part of the Administration’s review of Bears Ears National Monument, Secretary Zinke spent a total of one-hour meeting with tribal leaders. What would you consider meaningful consultation?**
- b. If confirmed, will you uphold the federal trust responsibility and ensure that Interior provides tribes with adequate government-to-government consultation on Bears Ears National Monument and any other lands issue that may affect them?**

**Response to a. and b.:** I am not at the Department, so I am unaware of the Secretary’s ongoing consultations. As I said in the hearing, I appreciate the importance of tribal consultation, take consultation seriously, and commit to consult with tribes, if confirmed.

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**Question 5:** At a recent tribal energy summit, Secretary Zinke made several statements that raised concerns to tribes including reexamining the Indian Reorganization Act and treating tribes like corporations. In a clarifying letter to the National Congress of American Indians, Acting Deputy Secretary James Cason stated that “at this time there are no plans to alter the Department’s current management of our trust responsibilities.”

Statements such as these have created uncertainty in Indian Country about this Administration’s view on the trust responsibility and whether there are plans to diminish the trust relationship among tribes and the federal government. Do you share the view that the trust relationship is up for reconsideration, and if so, in what areas would you seek changes to that relationship?

**Response:** I am not aware of these statements.

**Question 6:** Each agency head has been instructed to undertake a review of their agency to determine how to reorganize the departments. What will you do to ensure proper consultation is conducted with tribal governments prior to any decisions or actions regarding reorganization?

**Response:** I appreciate the importance of tribal consultation, take consultation seriously, and commit to consult with tribes as appropriate, if confirmed

**Question 7:** Economic development is vital for improving Indian Country, and one area of opportunity is the energy sector. For example, there is significant potential for clean energy development in Indian Country—like wind, solar, and biomass. I have been working to fund the Tribal Energy Loan Guarantee Program (TIELGP), which was included in the Energy Policy Act of 2005 but received its first funding in Fiscal Year 2017. This program would allow the DOE to guarantee up to 90 percent of the principal and interest of a loan issued to an Indian tribe for energy development. By leveraging federal resources, this program would encourage borrowers to partner with the private sector to develop energy projects. Will you commit to working with me to boost renewable energy generation on tribal lands, which would bring important funds and jobs to these communities?

**Response:** If confirmed, I commit to learning more about this program and working with you and Secretary Zinke, as appropriate.

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**Question 8:** A recent National Institute of Justice report found that more than half of American Indian and Alaska Native women—and more than one in four men—have experienced sexual violence in their lifetime. And among those who have experienced sexual violence, almost all—96% of women and 89% of men—have been victimized by a non-Indian partner. That is a horrific statistic. And despite their prevalence, crimes of sexual violence committed by non-Indians in Indian Country often go unprosecuted and unpunished, leaving victims without justice and offenders on the loose. So last Congress, Senator Murkowski and I introduced the Justice for Native Survivors of Sexual Violence Act, which would recognize and reaffirm Indian tribes' inherent power to exercise criminal jurisdiction over non-Indians who commit crimes of sexual violence in Indian Country. This commonsense legislation will lay the groundwork for tribes to address sexual violence in their communities in a meaningful way, and I'm looking forward to reintroducing the bill soon.

**Mr. Bernhardt, I want to know from you how the Interior Department will work with tribes to strengthen their tribal justice systems and ensure that they have the resources they need to take on this critical work. I also understand that the Department of Justice has the primary responsibility for investigating and prosecuting crime in much of Indian country. When Senator Sessions came before the Judiciary Committee, I asked him about his views on these issues and was concerned by how much he has to learn about law enforcement in Indian Country. Can you assure me that you will coordinate and share information with the DOJ to ensure that there is a comprehensive understanding of how these crimes impact Indian Country?**

**Response:** I completely agree these are horrible statistics and the situation is appalling. I will do everything I can to facilitate the sharing and coordination of information with the Department of Justice to ensure a better understanding of the impacts of these crimes.

**Question 9: You spent nearly eight years at the Department of the Interior during the Bush Administration, and during that time you played key roles in overseeing the Department's relationship with Congress and in monitoring the ethical culture at the Department. Given your senior role in the Bush Department of the Interior, you had a front row seat to the numerous scandals that plagued the Department.**

**a. Can you describe your relationship with lobbyist Jack Abramoff? On what occasions did you meet him and what were the purposes of those meetings?**

**Response:** I have no relationship and do not believe I ever met him.

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**b. Can you describe your relationship with then-Deputy Secretary Steven Griles? At what point did you become aware of his involvement with illegal activities?**

**Response:** He was the Deputy Secretary of the Department of the Interior. I became aware of his illegal activities when he was indicted.

**c. Robert McCarthy was a DOI employee who became a whistleblower, exposing mismanagement of Indian Trust funds. Mr. McCarthy subsequently was forced to resign. Can you describe your role, if any, with regards to his resignation? How do you plan to deal with whistleblowers who reveal corruption at the agency if you are confirmed?**

**Response:** I believe that anyone who reveals corruption up their chain of command or to the Inspector General should be protected, consistent with applicable law and practice. However, in general I do not believe Mr. McCarthy's actions were proper. Lawyers and auditors who have an additional set of ethical duties should take inappropriate matters up their chain of command or to the Office of Inspector General before they go to media. I understand that in a settlement of a challenge to his dismissal, he was allowed to resign.

**d. When Senator Stabenow asked about the allegations that scientific information provided by USFWS scientists was altered in preparing Senate Testimony for Secretary Norton, you responded that you had not altered the science. Can you please elaborate?**

**Response:** Yes, to the extent any documentation was modified, it was not modified by me, and I do not believe I was aware of it until it had been disseminated.

**Question 10: While you were at the Department, the DOI Executive Resources Board, or ERB, recommended salary increases for top level employees. The ERB also gave out awards, called STAR awards, designed to recognize particularly outstanding accomplishments by DOI employees.**

During the Bush Administration, the ERB distributed a substantial number of STAR awards to senior officials at the Department of the Interior, including several members of ERB itself. It appears that STAR awards, which were supposed to be used to reward exceptional work, were essentially used as a tool whereby DOI political appointees enriched themselves with taxpayer money. One particularly egregious example was a nearly \$10,000 award for Deputy Assistant Secretary Julie MacDonald in 2004. Routinely, these awards were given to political appointees without any written justification and without formal nomination.

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**a. Were you on the ERB in 2004?**

**Response:** I am not sure of the dates, but I did serve on the ERB for certain years.

**b. Were you in any way involved in the awarding of the award to Ms. MacDonald? If so, what was your justification?**

**Response:** If I was on the ERB when she received a reward, I could have been part of that process, along with others on the ERB and her supervisors. I do not recall the justification, but I believe there would be a written justification associated with the award, if it occurred.

**c. You, yourself, received a \$7,000 STAR award in 2004. The guidance in place at the time capped awards at \$5,000. Did the size of your award surprise you?**

**Response:** I have no recollection of my reaction. Money has not been motivating factor for my experience with public service.

**Question 11: With a changing climate, we are seeing longer wildfire seasons and more extreme fires. At the same time, more and more people in the United States are living in and around forests, grasslands, shrublands, and other vegetated natural areas – places commonly referred to as the wildland-urban interface (WUI). Approximately 70,000 communities nationwide are considered to be at high risk from wildland fire, including some in Minnesota. Defense of private property – much of which is located in the WUI – accounts for a large percentage of fire suppression costs. How will you work with the United States Forest Service to mitigate the costs of these fires while ensuring the safety of vulnerable communities?**

**Response:** The issues surrounding the prevention of forest fires and funding for fire suppression efforts are important. If I am confirmed, I will evaluate the Department's current role in fire prevention and suppression and work closely with USDA, the Forest Service, states, and Congress to ensure that these programs are appropriately managed.

**Question 12: Do you believe that climate change impacts should be included in environmental reviews under the National Environmental Policy Act (NEPA)?**

**Response:** As I indicated at my hearing, I will consider the science on climate change and the applicable law in recommending policy decisions that are consistent with the Administration's agenda and the law, should I be confirmed.

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**Questions 13: Do you believe that climate change has a cost to society and that this social cost of carbon should be used in regulatory analyses?**

**Response:** As I indicated at my hearing, I will consider the science on climate change and the applicable law in recommending policy decisions that are consistent with the Administration's agenda, should I be confirmed.

**Question 14: If confirmed, what will do you do to promote renewable electricity generation—including wind and solar—on public lands?**

**Response:** I am a supporter of an all-of-the-above energy policy that includes the development of renewable energy projects and transmission projects on federal lands.

**Question 15:** The Land and Water Conservation Fund has been a critical tool over the past 50 years to secure America's natural and historical treasures. In my state, LWCF has helped protect national icons like the Boundary Waters Canoe Area Wilderness and Voyageurs National Park as well as local parks and playgrounds. The Fund is paid for by a small portion of receipts collected from offshore energy extraction. Indeed the Fund was conceived with the understanding that we would permanently protect our outdoor recreation heritage for all Americans to use, in exchange for the depletion of another non-renewable national asset.

The Fund is supposed to receive \$900 million each year, but typically it receives substantially less than that. When the Secretary testified before this committee in January, he stated his support for full funding of LWCF. However, the initial budget release from the administration in March suggests that LWCF will likely be severely cut once the full budget is released.

**Should you be confirmed, will you commit to an annual budget that allocates all of the annual \$900 million from the LWCF account to the programs identified by Congress each year in the appropriations bill?**

**Response:** I share Secretary Zinke's support for the LWCF and look forward to working with you and your colleagues on the program, if confirmed.

**Question 16: Under what circumstances would you support or oppose the transfer of public land to state governments? For example, if Congress passed a bill transferring large sections of public lands to the states, would you recommend that the President veto it?**

**Response:** I support the Secretary's views.



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**Question 17: Do you support allowing state and local governments to manage federal public lands? From a practical standpoint, how is this different from transferring federal lands to states?**

**Response:** I share the Secretary's view that federal lands need to be managed with particular consideration of the people in local communities whose lives and livelihoods depend on the land.

**Question 18: According to the Bureau of Land Management's statistics for Fiscal Year 2015, there are 32.1 million acres of public lands (approximately the size of Alabama) currently under lease for oil and gas activities. However, merely one-third of these acres are actually producing fuel. In fact, the United States has a record high 7,500 approved drilling permits that industry has yet to put to use.**

- a. In light of this overcapacity, do you believe it is necessary for United States to open up additional public land for oil and gas production? If so, why?
- b. How do you balance this with the need to maintain public access to federal lands?

**Response to a. and b.:** If confirmed as Deputy Secretary, I would support the Secretary's efforts to foster responsible development of coal, oil, gas, and renewable energy on federal and tribal lands.

**Question 19: The United States has been chronically underfunding our National Parks for years. As you know, the parks currently face a more than \$12 billion backlog in deferred maintenance, including \$47 million in Minnesota. I appreciate that you have committed to working with Congress to solve this unacceptable deferred maintenance backlog.**

- a. What do you feel would be the best way to approach this issue?
- b. Will you advocate to include deferred maintenance in any infrastructure package the new administration is planning?

**Response to a. and b.:** I know Secretary Zinke is committed to prioritize and find innovative ways to address the maintenance backlog and enhance our parks' infrastructure.

## U.S. Senate Committee on Energy and Natural Resources

May 18, 2017 Hearing

## The Nomination of Mr. David Bernhardt to be Deputy Secretary of the Interior

**Question 20:** Many of the communities in my home state of Minnesota cannot safely rely on the water currently supplied to their homes. These communities and my state have worked tirelessly, investing millions of dollars, in a tristate water system known as the Lewis & Clark Regional Water System. A successful state and federal partnership, Lewis & Clark is funded by local communities, states and expected annual funds from the federal government. Like two water projects in your home state of Montana, federal funding for Lewis & Clark is allocated through the Department of Interior's Bureau of Reclamation. Nearly completed, all communities and states involved have paid their share of the project and in numerous cases, prefunded the necessary dollars to complete this critical water project. However, the federal share of the project has fallen short year-after-year, putting the project far behind construction schedule causing an increase in cost to the project. Will you support prioritizing the Lewis & Clark Regional Water System through the water funds allocated by the Bureau of Reclamation?

**Response:** While I am not familiar with the specific details of the funding concerns pertaining to the Lewis & Clark Regional Water System, I am familiar with Bureau of Reclamation's rural water projects. These projects benefit rural communities and are important to supporting the livelihood of local economies. If confirmed, I look forward to learning more about the particular details of this project.

**Question 21:** Mr. Bernhardt, when we met, you told me that you will sign the ethics pledge required by the Trump Administration under Executive Order 13770. The ethics pledge requires that for two years, you will not, and I quote, "participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." It also includes issues that you lobbied on.

- a. Do you intend to sign the ethics pledge and recuse yourself for two years on relevant issues?

**Response:** Yes.

- b. If so, will you share this document with the committee? And if not, why not?

**Response:** I have assumed the document would be public since my ethic agreement is public.

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- c. How will we know that you are sticking with the two-year recusal? Will you, on a quarterly basis, for two years, provide the committee a list of the matters from which you are recused?

**Response:** Because I have agreed to do it and I will work with the Department's Designated Agency Ethics Official on a regular basis to ensure I am implementing best practices. I will not provide a list, but I will commit to visiting with you as often as you would like.

- d. Executive Order 13770 allows the president to grant waivers exempting lobbyists from this ban. This is not uncommon, but what stands out is the order's elimination of the requirement that such waivers be publically disclosed once they occur. Will you commit to publically disclose the issuance of any waivers you may receive from this administration so that the American people have greater transparency into potential conflicts of interest? If not, why not?

**Response:** I do not know under what circumstances I might seek a waiver because I do not anticipate doing so. However, should I seek a waiver from the Designated Agency Ethics Official, I will discuss whether such a request should be made public.

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**Questions from Senator Steve Daines**

**Question 1:** I understand you have done a lot of work dealing with the Endangered Species Act. And, I know you are familiar with the Ninth Circuit Court's misguided ruling in *U.S. Forest Service vs. Cottonwood Environmental Law Center*. The Obama administration argued that the ruling has the "potential to cripple" federal land management across Ninth Circuit states, and I have no doubt that Secretary Zinke shares this concern.

- a. **Do you agree that the burdensome extra layer of consultation required in the *Cottonwood* decision could substantially slow forest management projects and is unnecessary to protecting at-risk species?**

**Response:** Yes.

- b. **Now that the Supreme Court has declined to hear the *Cottonwood* case, Senator Jon Tester and I have introduced legislation to statutorily reverse the decision. Can I get your commitment to speedily work in a bipartisan manner to enact a legislative solution?**

**Response:** Yes, I will commit to working with you in a bipartisan manner.

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**Questions from Senator Joe Manchin III**

**Question 1:** The Land and Water Conservation Fund (LWCF) expired September 30, 2015. The fund was temporarily extended for 3 years in the Consolidated Appropriations Act, 2016, and will expire again September 30, 2018, if Congress fails to pass reauthorization. The 2017 omnibus funding bill funds LWCF at \$400 million - \$50 million less than the fiscal 2016 enacted level. West Virginia has received approximately \$233 million in LWCF funding over the past five decades, protecting places like the New River Gorge National River, and the Harpers Ferry National Historical Park, both of the National Park Service. West Virginia has 61,000 outdoor recreation jobs, and generates approximately \$272 million in annual state tax revenue. In 2016, several local governments in West Virginia received grants totaling \$418,473 from LWCF funds from the "state side." Previously, funds from the "federal side" have been used to acquire lands at Canaan Valley National Wildlife Refuge. These are vital to the outdoor economy and heritage of West Virginia.

**If you are confirmed, will you commit to working with Congress to find a permanent reauthorization of LWCF?**

**Response:** I share Secretary Zinke's support for the LWCF and look forward to working with you and your colleagues to reauthorize the program.

**Are you willing to accept reforms to LWCF?**

**Response:** As noted in the response to the previous question, I share Secretary Zinke's support for the LWCF and look forward to working with you and your colleagues to reauthorize the program.

**If so, what reforms are you willing to accept and not accept?**

**Response:** Should I be confirmed, I would look forward to working with Secretary Zinke, you, and your colleagues to reauthorize the program, including identifying stable, diverse and long-term funding mechanisms to keep the fund viable for generations to come.

**Question 2: If confirmed, you have pledged to recuse yourself for two years from matters involving your former clients per the ethics pledge that President Trump put forth for his nominees to sign.**

**If confirmed, do you plan to serve longer than two years as Deputy Secretary?**

**Response:** If confirmed, I plan to serve at the pleasure of the President, and anticipate that could be through his term.

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**How will you ensure you are avoiding all conflicts of interest if you indeed work on matters involving your former clients after the two-year pledge expires?**

**Response:** If confirmed, I will follow my ethics agreement, and for the entire duration of my tenure I will consult, seek, and follow the guidance of the Department of the Interior's Designated Agency Ethics Official.

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**Questions from Senator Martin Heinrich**

**Question 1:** I continue to hear about problems arising from the large number of long-standing job vacancies in BLM's field offices in New Mexico. Of particular concern are significant vacancies in Farmington, the Federal Indian Minerals Office and Carlsbad. I understand there are as many as 21 vacant positions in Carlsbad alone, as well as the position of the Field Office Manager. Clearly the administration's hiring freeze contributed to the delay in filling these important federal jobs. If you are confirmed, what actions will you take to address promptly the need to fill the large number of job vacancies in New Mexico's various BLM offices?

**Response:** Although I am not aware of the status of current job vacancies within the Department's bureaus or efforts to fill those positions, Secretary Zinke has stressed one of his priorities is to get the right tools and resources out to the field, and I will look into this if confirmed.

**Question 2:** President Trump in his signing statement enacting the FY2017 Omnibus Appropriations Bill implied that some programs and services for American Indians and tribes may not comply with the Due Process Clause of the Constitution. The signing statement reads:

My Administration shall treat provisions that allocate benefits on the basis of race, ethnicity, and gender (e.g., Division B, under the heading "Minority Business Development"; Division C, sections 8016, 8021, 8038, and 8042; Division H, under the headings "Departmental Management Salaries and Expenses," "School Improvement Programs," and "Historically Black College and University Capital Financing Program Account"; Division K, under the heading "Native American Housing Block Grants"; and Division K, section 213) in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment.

**Do you believe that programs and services for Indian tribes and their members, as currently implemented, are constitutional?**

**Response:** As I indicated at the hearing, I am not familiar with this signing statement and I have assumed that many of these programs are constitutional.

**Question 3:** During the hearing, in response to a question about conducting full tribal consultation before making any changes to the land-into-trust process, you first said that you would "participate in some form of engagement", and in response to a follow up question, said that any distinction between "engagement" and "consultation" is a "distinction without a difference". However, as you know, "tribal consultation" has a particular meaning in U.S. law, involving specific commitments, processes, and procedures, while "engagement" could mean as little as a form letter or a phone call.

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**If the Department of the Interior considers changes to the land-into-trust process, will you commit to engaging in a tribal consultation process before finalizing any such decision?**

**Response:** As I stated to you at the hearing, I will support a full tribal consultation for any meaningful changes. However, because I am not at the Department, I cannot tell you what changes the Department of the Interior intends, if any, and I do not know what consultation process the Department currently intends to take.

**Question 4: Good information is vital for good decision-making, and the government must act as an honest broker. Do you believe that the office of the Secretary of the Interior has the prerogative to interpret for Congress and the public the data and assessments of scientists at the FWS and other Interior science agencies?**

**Response:** As I stated at my hearing, my view is that policy decisions should be predicated on the evaluation of science as it is and application of the law. I believe when scientific data is evaluated on its merits and used as a basis to make policy decisions that are honest to the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.

**Question 5: The Bureau of Indian Education (BIE) is implementing a reorganization plan developed with minimal tribal input. Will you commit, moving forward, to engaging tribes in meaningful consultation on any reorganization, and any BIE policy changes that affect tribes?**

**Response:** I am not familiar with the reorganization plan you reference and would need to learn more about it and the process to provide a meaningful response to your question.

**Question 6: The Department of Interior's regulatory and scientific agencies invest taxpayer dollars to produce a wealth of data about the nation's energy and natural resources. Will you commit to maintaining the integrity and public accessibility of datasets produced by Interior staff?**

**Response:** The integrity of scientific data and its application in decision making on behalf of the public are of paramount importance to me. Should I be confirmed, I commit to continuing this commitment and applying it to policy recommendations.



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Questions from Senator Mazie Hirono

**Question 1: Mr. Bernhardt, beginning in April 2001 you directed the Department of Interior's Office of Congressional and Legislative Affairs. In this position, were you responsible for drafting, editing, or reviewing testimony for then-Secretary Norton?**

**Response:** The generation of testimony for Congress generally involves a whole host of entities throughout the Department of the Interior, including individual bureaus, Solicitors office, senior advisors, Administration appointees, and the White House Office of Management and Budget. My office would have had engagement at each stage and ultimately transmitted the testimony to the Committee.

**Question 2: (Follow-up to Question 1) If so, please describe your contribution to the drafting, editing, and review of Ms. Norton's testimony responding to questions submitted by then-Chair Frank Murkowski on U.S. Fish and Wildlife Service findings relating to the impact of drilling on caribou in the Arctic National Wildlife Refuge?**

**Response:** As I stated in my previous response, the generation of testimony for Congress generally involves a whole host of entities throughout the Department of the Interior, including individual bureaus, Solicitors office, senior advisors, Administration appointees, and the White House Office of Management and Budget. My office had engagement at each stage and ultimately transmitted the testimony to the Committee.

**Question 3: (Follow-up to Question 1) At the time the testimony was drafted and reviewed at the Department of Interior, were you aware of the use of information contained in a report funded by BP Oil in Ms. Norton's testimony?**

**Response:** No, at the time I was just learning about ANWR and I was not then serving as the Secretary's primary policy counselor on the issue.

**Question 4: Do you believe the Fish and Wildlife Service provides valuable scientific expertise in shaping policy for the Department of Interior?**

**Response:** Yes.

**Question 5: To what extent will you consider scientific data in shaping policy if it fails to align with the President's political agenda?**

**Response:** As I stated at my hearing, my view is that policy decision should be predicated on the evaluation of science and application of the law. I believe when scientific data is evaluated on its merits and used as an information base to make policy decisions that are honest to the science and transparent regarding the policy choice, conflicts will be reduced

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and those decisions will be reliable and legally sound.

**Question 6:** During the hearing in your response to Senator Franken regarding the use of climate change science in shaping policy you said that you would “take the science as it comes.” Please explain what that means.

**Response:** Generally, we have to use the data we have available to make decisions in the context of the law and the discretion of the executive branch.

**Question 7: (Follow-up to Question 6)** As you may be aware, there is a substantial body of research conducted over multiple decades in multiple countries as to the causes, impacts, and effects of climate change. Given the data-driven scientific consensus regarding the current and future impacts of climate change on our communities, national security, and economy what additional scientific evidence would you be looking for to develop policy as Deputy Secretary?

**Response:** As I indicated in response to a similar question at my hearing, as a policymaker we must take the science as we find it, whatever it may be, and use it to make informed decisions, with the discretion we are given under the law.

**Question 8:** During the hearing you highlighted the concerns raised by the President on the impact activities to mitigate climate change would have on jobs, assuming that you were referencing jobs within the fossil fuel extraction industry. However, as you may be aware, there is a substantial body of evidence that climate change will negatively impact our broader economy in the long-term. In addition, as Sen. Franken pointed out, renewable energy jobs are a substantial and growing sector of American jobs which are less likely to be outsourced. As Deputy Secretary you will be second in line to assume the responsibility of protecting and managing natural resources for the U.S. public interest. In deciding policy matters how much weight will you give to protecting fossil fuels jobs versus protecting our nation’s long-term economic and environmental health?

**Response:** As I stated at my hearing, my view is that policy decisions should be predicated on the evaluation of science and application of the law. If confirmed, I will make decisions with an open mind, actively seeking input and listening to varied views and perspectives.

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**Question 9: Do your business clients at Brownstein Hyatt Farber Schreck LLP have business interests in matters currently pending or that will likely come before the Department of Interior within the next few years?**

**Response:** Yes, but to the extent they do, I will follow my ethics agreement.

**Question 10: During the hearing in your response to Senator Stabenow you stated that you are certain that scientists at Interior are not under attack. Under this administration there have been reports of instances where National Park Service employees have been prohibited from publicly communicating climate facts and reprimanded for posting pictures of attendance at the inauguration. If not an “attack” how would you classify these directives?**

**Response:** As I stated at my hearing, I do not believe that scientists at the Department are under attack. Although I am not at the Department, I understand that the directives you have identified, related to the National Park Service’s official twitter account, were already existing policies.

**Question 11: If confirmed as Deputy Secretary, will you encourage a culture of transparency at the Department of Interior?**

**Response:** Yes.

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**Question from Senator Angus S. King, Jr.**

**Question:** Do you believe that prior record of service and performance should be a factor when considering how the National Park Service awards concession contracts?

**Response:** Yes.

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Questions from Senator Catherine Cortez Masto

**Question 1: You appear to have several conflicts of interests from representing oil, gas, and water clients as a lobbyist working at the firm Brownstein, Hyatt Farber Schreck, LLP. You have stated that you will recuse yourself from matters involving your former clients for a year. Which particular matters involving your clients are currently pending before the Department?**

**Response:** I believe that public trust is a public responsibility and that maintaining an ethical culture is important. I will fully comply with the ethics agreement that I signed. In addition, for the duration of my service, I intend to actively seek and consult with the Department's Designated Agency Ethics Official regarding particular matters involving specific parties of former clients or entities represented by my former firm. Finally, I will install a robust screening process, should one not exist within the office.

That said, on May 4, 2017, the Committee on Energy and Natural Resources received correspondence from the General Counsel of the United States Office of Government Ethics, David J. Apol.

Mr. Apol's correspondence included an enclosure of the "ethics agreement outlining the actions that the nominee [David Bernhardt] will undertake to avoid conflicts of interest." Further, General Counsel Apol explained, "we [the Office of Government Ethics] believe that this nominee [David Bernhardt] is in compliance with the applicable laws and regulations governing conflicts of interest."

In addition, I have reviewed some of the prior ethics agreements provided to the Committee in the past. There is a striking degree of consistency between the ethics agreement provided by Mr. Apol and the prior agreements provided by other nominees to positions within the Department of the Interior who worked in large private law firms representing similar clients, and in some cases the same clients. Copies of two such ethics agreements are attached to this correspondence to give you a sense of the similarities.

Given General Counsel Apol's determination that the ethics agreement I signed complies with the Office of Government Ethics' regulations and the applicable laws governing conflicts of interest, as well as the obvious similarity between that ethics agreement and those the Committee previously found sufficiently clear to proceed with the nomination, I reaffirm that I will comply with the ethics agreement I signed.

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**Question 2: After the year, what will your approach be as issues involving these clients arise?**

**Response:** I will follow my ethics agreements in consultation with the Department's Designated Agency Ethics Official.

**Question 3: Under what circumstances would you seek a recusal? Or a waiver from a recusal? How transparent will that process be?**

**Response:** I do not anticipate seeking a waiver. However, should I do so, I will consult with the Department's Designated Agency Ethics Official on best practices.

**Question 4: As Deputy Secretary, you will oversee the Bureau of Land Management and the National Park Service. What are your thoughts on the Antiquities Act?**

**Response:** It was a significant grant of power to the President by the Congress.

**Question 5: What would your approach be with respect to the review of our monuments?**

**Response:** If confirmed, I do not know if I will have a role in the review process.

**Question 6: As a part of the review, would you consider widespread support from the state?**

**Response:** If I were part of such a review, yes.

**Question 7: Do you believe that monuments are important for outdoor recreation and rural economies to thrive?**

**Response:** In some instances, yes very important.

**Question 8: Resource Advisory Councils (RACs) are a crucial way for DOI to get diverse community input on public land management issues. RACs have helped inform decisions on issues related to recreation, land use planning, wildfire management, etc. I am concerned that these meetings are being postponed until September 2017 due to a full scale review. Do you believe community input is essential?**

**Response:** Yes.

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**Question 9: Will you continue to postpone these meetings?**

**Response:** I did not postpone the meetings.

**Question 10: In Nevada, the Gold Butte National Monument Public Information forum has also been postponed. The shutting down of public input is disconcerting. What would your approach be with respect to the ongoing review of monuments and the measures taken to exclude our resource advisory councils and communities?**

**Response:** As I am not at the Department, I am uncertain if I will play a role in either review process.

**Question 11: Are you a strong supporter of states' rights?**

**Response:** Yes.

**Question 12: Do you believe a state should have a say in protecting its monuments?**

**Response:** Yes.

**Question 13: What are your thoughts on the protection of public lands?**

**Response:** I think protecting certain lands is one of the Department's highest duties.

**Question 14: There has been a push to privatize public lands, but the counties in my state cannot afford to properly manage these areas. Do believe in the agency's continued role in managing and protecting public lands?**

**Response:** Yes.

**Question 15: Do you support the BLM Methane rule? It has been reported that Secretary Zinke will be reviewing the rule internally. What would your approach be in reviewing the rule?**

**Response:** I have no informed view of the final rule, but I would learn about it by reading the rule and its administrative record, evaluating prior comments, listening to the career staff that developed it, and reviewing the complaints about it.

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**Question 16: Nevada is the driest state in the Nation. Please describe your approach in helping Western states address water scarcity and resiliency?**

**Response:** I will do everything I can to ensure that the Department is a good neighbor, facilitating a collaborative approach to addressing scarcity and resiliency.

**Question 17: How would you help to facilitate another water sharing agreement once Minute 319 under the U.S. Mexico water treaty expires this year?**

**Response:** I would need to get up to speed on where the Department is at and where the Basin states are before I could answer this question.

**Question 18: Because the lower basin states are all dependent upon the Colorado River, do you believe we also need to increase our water supply regionally by investing in recycling, groundwater storage, and stormwater capture?**

**Response:** I think that these are good things to do.

**Question 19: What about ensuring that refuges get the federal water supplies they need and are receive under the law?**

**Response:** I think this is important.

**Question 20: How would you approach wild horse management concerns that we have in my state?**

**Response:** By working with you and your colleagues on the issue.

**Question 21: Do you believe there should be a task force to facilitate consensus?**

**Response:** I know that several administrations have made efforts here and failed, so before I suggest that a task force is a magic bullet, I would need to understand the scope of any previous review and how those reviewers were empowered. There have been many studies of the situation, and we need to find a pathway to fix it.



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**Question 22: How will you protect agency scientific findings that may be politically challenging, but should be the basis for decisions and analysis from each Bureau and Department?**

**Response:** I will not shrink from taking the evidence as I see it and developing a reasoned articulation of the conclusions I draw based upon the facts found and the legal framework I am working under.

Attachment referenced in response to Sen. Cantwell  
questions 1, 2, 3, 17, 18

David J. Hayes  
Washington, D.C. 20510

March 3, 2009

Melinda J. Loftin  
Designated Agency Ethics Official  
and Director, Ethics Office  
U.S. Department of the Interior  
1849 C St. NW, MS 4259  
Washington, DC 20240

Dear Ms. Loftin:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of the Interior.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any other person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

On December 31, 2008, I retired from my position as a partner with the law firm of Latham & Watkins. I currently have a capital account with the firm, and I will receive a refund of that account within sixty days after my retirement (i.e. by approximately February 28, 2009). Until I have received this refund, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the ability or willingness of the firm to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which the firm of Latham & Watkins is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Following my retirement, I will receive a fixed retirement benefit over a 10-year period based upon a formula computed from years of service, age of retirement, and level of salary. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of Latham & Watkins to provide this benefit to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

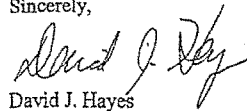
Prior to confirmation, I resigned from the following positions: Senior Fellow, World Wildlife Fund; Senior Fellow, Progressive Policy Institute; Consulting Professor, Stanford University; Vice Chairman, American Rivers; Board Member, RESOLVE; Board Member, Natural Heritage Institute and Member, Obama-Biden Transition Project's Agency Review Working Group. Upon confirmation, I will resign from my position as Chairman of Stanford Law School Board of Visitors. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). ~~[Deletion Per FOIA Exemption 6, 5 U.S.C. § 552(b)(6), Personal Privacy]~~

Upon confirmation, I will also resign my position as a trustee of the B. Hayes Trust. For a period of one year after my resignation from this position, I will not participate personally and substantially in any particular matter involving specific parties in which the B. Hayes Trust is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I will retain my interest in the vacation properties in Livonia, New York and in Wintergreen Virginia which are adjacent to Federal lands. Pursuant to 18 U.S.C. § 208, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on these properties, unless I first obtain a written waiver under section 208(b)(1) or qualify for a regulatory exemption under section 208(b)(2). Any particular matters identified as likely to have a direct and predictable effect on these properties will be routed automatically to an agency official other than me.

If I am confirmed as Deputy Secretary of the Department of the Interior, I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103. Therefore, I will not hold any such interests during my appointment to the position of Deputy Secretary.

Sincerely,

  
David J. Hayes

Janice M. Schneider  
Washington, DC

November 13, 2013

Melinda Loftin  
Designated Agency Ethics Official  
and Director, Ethics Office  
U.S. Department of the Interior  
1849 C Street, NW, MS 7346  
Washington, DC 20240

Dear Ms. Loftin,

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interests in the event that I am confirmed for the position of Assistant Secretary -- Land and Minerals Management of the U.S. Department of the Interior.

As required by 18 U.S.C. 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any other person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon my confirmation, I will resign from my position as partner with the law firm Latham & Watkins, LLP. I currently have an equity capital account with the firm, and I will receive a refund of that account in its entirety upon withdrawal from the firm and before I assume the duties of Assistant Secretary -- Land and Minerals Management. Pursuant to the Latham & Watkins Partnership Agreement, I will also receive a *pro rata* partnership share based on the estimated value of my partnership interests for services I performed in 2013 through the date of my resignation. The firm will make this payment to me before I assume the duties of Assistant Secretary -- Land and Minerals Management.

If Latham & Watkins decides to pay me a bonus for work I performed during 2013, I will not accept the bonus and, instead, will forfeit the payment, unless I receive the payment before I assume the duties of the position of Assistant Secretary -- Land and Minerals Management. If I receive any such payment, I will not participate personally and substantially in any particular matter involving specific parties in which Latham & Watkins is a party or represents a party for a period of two years from the date on which I receive payment of the bonus, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c). If I do not receive any such payment, I will not participate personally and substantially in any particular matter involving specific parties in which Latham & Watkins is a party or represents a

party for a period of one year from the date of my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

In addition, I will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 CFR 26345.502(d).

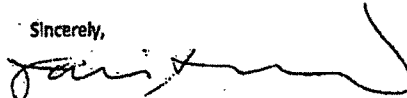
I will divest my interests in the entities listed on Attachment A within 90 days of my confirmation. With regard to each of these entities, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 USC 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 USC 208(b)(2). I understand that I may be eligible to request a Certificate of Divestiture for these assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will divest these assets within 90 days of my confirmation and invest the proceeds in non-conflicting assets.

I understand that as an appointee, I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments that I have made in this and any other ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with other ethics agreements of Presidential nominees who file public financial disclosure reports.

Finally, if confirmed as Assistant Secretary—Land and Minerals Management of the Department of the Interior, I am aware that I am prohibited by 30 U.S.C. 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. 3501.103. Therefore, I will not hold any such interests during my appointment.

Sincerely,



Janice M. Schneider

Janice M. Schneider  
Washington, DC  
May 14, 2014

Melinda Loftin  
Designated Agency Ethics Official and  
Director, Ethics Office  
U.S. Department of the Interior  
1849 C Street, NW, MS 7345  
Washington, DC 20240

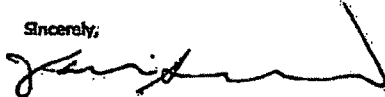
Dear Ms. Loftin,

I am writing to supplement the financial disclosure report that I signed on November 13, 2013 and to supplement the ethics agreement that I signed on November 13, 2013. The purpose of these supplements is to clarify the manner in which I will handle the matter of tax reserves held by Latham and Watkins after I resign from the firm. As stated in my November 13, 2013 letter, I will receive a pro rata partnership share from Latham and Watkins based on the estimated value of my partnership interests for services I performed in 2013 through the date of my resignation. The firm will make this payment to me before I assume the duties of Assistant Secretary – Land and Minerals Management.

Latham & Watkins may withhold a portion of my partnership share as a reserve for account reconciliations and tax payments that the firm makes on behalf of its partners. If these reserve funds are insufficient to cover the applicable taxes, the firm will invoice me for the difference. If the reserve funds exceed the applicable taxes, the firm will refund the balance to me by February 2016. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability and willingness of the firm to provide any payments to me under this tax agreement unless I first obtain a written waiver, pursuant to 18 U.S.C. §208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. §208(b)(2).

I have been advised that this ethics agreement supplement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with other ethics agreements of Presidential nominees who file public financial disclosure reports.

Sincerely,



Janice M. Schneider

Attachment referenced in response to Sen. Cortez Masto  
question 1



David J. Hayes  
Washington, D.C. 20510

March 3, 2009

Melinda J. Loftin  
Designated Agency Ethics Official  
and Director, Ethics Office  
U.S. Department of the Interior  
1849 C St. NW, MS 4259  
Washington, DC 20240

Dear Ms. Loftin:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of the Interior.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any other person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

On December 31, 2008, I retired from my position as a partner with the law firm of Latham & Watkins. I currently have a capital account with the firm, and I will receive a refund of that account within sixty days after my retirement (i.e. by approximately February 28, 2009). Until I have received this refund, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the ability or willingness of the firm to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which the firm of Latham & Watkins is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Following my retirement, I will receive a fixed retirement benefit over a 10-year period based upon a formula computed from years of service, age of retirement, and level of salary. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of Latham & Watkins to provide this benefit to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).

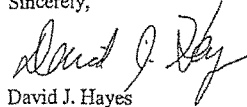
Prior to confirmation, I resigned from the following positions: Senior Fellow, World Wildlife Fund; Senior Fellow, Progressive Policy Institute; Consulting Professor, Stanford University; Vice Chairman, American Rivers; Board Member, RESOLVE; Board Member, Natural Heritage Institute and Member, Obama-Biden Transition Project's Agency Review Working Group. Upon confirmation, I will resign from my position as Chairman of Stanford Law School Board of Visitors. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). ~~[Deletion Per FOIA Exemption 6, 5 U.S.C. § 552(b)(6), Personal Privacy]~~

Upon confirmation, I will also resign my position as a trustee of the B. Hayes Trust. For a period of one year after my resignation from this position, I will not participate personally and substantially in any particular matter involving specific parties in which the B. Hayes Trust is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I will retain my interest in the vacation properties in Livonia, New York and in Wintergreen Virginia which are adjacent to Federal lands. Pursuant to 18 U.S.C. § 208, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on these properties, unless I first obtain a written waiver under section 208(b)(1) or qualify for a regulatory exemption under section 208(b)(2). Any particular matters identified as likely to have a direct and predictable effect on these properties will be routed automatically to an agency official other than me.

If I am confirmed as Deputy Secretary of the Department of the Interior, I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103. Therefore, I will not hold any such interests during my appointment to the position of Deputy Secretary.

Sincerely,



David J. Hayes

Janice M. Schnelder  
Washington, DC

November 13, 2013

Melinda Loftin  
Designated Agency Ethics Official  
and Director, Ethics Office  
U.S. Department of the Interior  
1849 C Street, NW, MS 7346  
Washington, DC 20240

Dear Ms. Loftin,

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interests in the event that I am confirmed for the position of Assistant Secretary—Land and Minerals Management of the U.S. Department of the Interior.

As required by 18 U.S.C. 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any other person whose interests are imputed to me, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon my confirmation, I will resign from my position as partner with the law firm Latham & Watkins, LLP. I currently have an equity capital account with the firm, and I will receive a refund of that account in its entirety upon withdrawal from the firm and before I assume the duties of Assistant Secretary—Land and Minerals Management. Pursuant to the Latham & Watkins Partnership Agreement, I will also receive a *pro rata* partnership share based on the estimated value of my partnership interests for services I performed in 2013 through the date of my resignation. The firm will make this payment to me before I assume the duties of Assistant Secretary—Land and Minerals Management.

If Latham & Watkins decides to pay me a bonus for work I performed during 2013, I will not accept the bonus and, instead, will forfeit the payment, unless I receive the payment before I assume the duties of the position of Assistant Secretary—Land and Minerals Management. If I receive any such payment, I will not participate personally and substantially in any particular matter involving specific parties in which Latham & Watkins is a party or represents a party for a period of two years from the date on which I receive payment of the bonus, unless I first receive a written waiver pursuant to 5 C.F.R. § 2635.503(c). If I do not receive any such payment, I will not participate personally and substantially in any particular matter involving specific parties in which Latham & Watkins is a party or represents a

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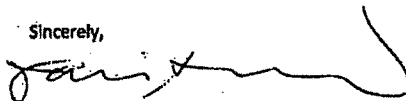
I will divest my interests in the entities listed on Attachment A within 90 days of my confirmation. With regard to each of these entities, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the entity until I have divested it, unless I first obtain a written waiver, pursuant to 18 USC 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 USC 208(b)(2). I understand that I may be eligible to request a Certificate of Divestiture for these assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will divest these assets within 90 days of my confirmation and invest the proceeds in non-conflicting assets.

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Sincerely,



Janice M. Schneider

Janice M. Schneider  
Washington, DC  
May 14, 2014

Melinda Loftin  
Designated Agency Ethics Official and  
Director, Ethics Office  
U.S. Department of the Interior  
1849 C Street, NW, MS 7346  
Washington, DC 20240

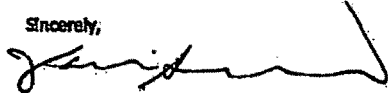
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Sincerely,



Janice M. Schneider



FOUNDED IN 1887 BY

THEODORE ROOSEVELT

**BOONE AND CROCKETT CLUB****B. B. HOLLINGSWORTH, JR.**

PRESIDENT

May 11, 2017

The Honorable Lisa Murkowski  
Chairman  
Committee on Energy and Natural Resources  
522 Hart Senate Office Building  
Washington, DC 20510

The Honorable Maria Cantwell  
Ranking Member  
Committee on Energy and Natural Resources  
511 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Murkowski and Ranking Member Cantwell:

The Boone and Crockett Club writes to express its support for the nomination of David Bernhardt for the position of Deputy Secretary of the Department of the Interior.

The Boone and Crockett Club has supported far-reaching conservation and hunting policy for over 125 years, since its founding by President Theodore Roosevelt. Through bold action, we have helped to build a system of conservation that has restored North American wildlife populations and habitat and is a model for the entire world. Mr. Bernhardt is a dedicated hunter-conservationist, and he is committed to facilitating the economic and conservation benefits that result from hunting. He has extensive knowledge and experience in crafting solutions to complex problems of restoring wildlife habitat and developing economic incentives and markets for conservation actions. He is keenly aware of the challenges of public access to public lands. Moreover, Mr. Bernhardt recognizes that hunters and anglers fund a large share of the habitat conservation work across the nation through license sales and self-imposed excise taxes on ammunition, tackle and firearms.

Having grown up hunting and fishing in rural western Colorado on public lands outside the town of Rifle, Mr. Bernhardt remains an active sportsman and recreational shooter.

In his previous capacity as the Solicitor of the Department of the Interior under then-Secretary Dirk Kempthorne, Mr. Bernhardt, who was unanimously confirmed to serve, proved himself to be a champion for sportsmen, shooters and wildlife. We can expect no different if he is afforded the opportunity to serve as Deputy Secretary.

The Boone and Crockett Club is proud to offer its strong support of David Bernhardt and we ask for your support for his confirmation.

Thank you.

Sincerely,

B.B. Hollingsworth, Jr.  
President, Boone and Crockett Club

2001 Kirby Drive, Suite 520, Houston, Texas 77019 • Phone 713/840-1508 • B&C Headquarters, 250 Station Dr., Missoula, MT 59801 • Phone 406/542-1888

TRAILBLAZERS IN CONSERVATION, FAIR CHASE IN HUNTING, AND SHARED USE OF NATURAL RESOURCES

## GILA RIVER INDIAN COMMUNITY

*Executive Office of the Governor & Lieutenant Governor*

*"Putting Our People First"*

*Stephen Roe Lewis*  
Governor



*Monica Lynn Antone*  
Lieutenant Governor

June 1, 2017

The Honorable Lisa Murkowski, Chairwoman  
Committee on Energy & Natural Resources  
United States Senate  
Washington, DC 20510

RE: Support for Nomination of Mr. David Bernhardt as Deputy Secretary of the Department of the Interior

Dear Chairwoman Murkowski,

I write on behalf of the Gila River Indian Community in support of the nomination of Mr. David Bernhardt to serve as Deputy Secretary of the Department of the Interior. Our support stems from our experience working with Mr. Bernhardt during his previous tenure as a senior official at the Department of Interior.

In particular, we negotiated extensively with Mr. Bernhardt on our water settlement—the Gila River Indian Community Water Rights Settlement that was enacted into law in 2004 as part of the Arizona Water Settlements Act. Mr. Bernhardt was a tough negotiator for the Department but also understood that the Community had legitimate rights to water. He was able to balance his role as an advocate for the Department with the understanding that the Department had a trust responsibility to the Community. Once a final settlement was reached, the Community found Mr. Bernhardt helpful in navigating the legislative process to ensure that Congress understood that the settlement benefited both the Community and the Federal government. As a result, the Community's water settlement was enacted into law and brought critical water resources to the Community and our members.

Based on our experience in negotiating and working on complex issues with Mr. Bernhardt we support his position as Deputy Secretary of the Department of the Interior. We believe he has an understanding of tribal sovereignty and the United States' trust responsibility to tribal nations, including the Gila River Indian Community.

Sincerely,

Stephen Roe Lewis  
Governor



**NATIONAL CONGRESS OF AMERICAN INDIANS**

May 25, 2017

Honorable Lisa Murkowski, Chair  
Committee on Energy & Natural Resources  
United States Senate  
Washington, DC 20510

Re: Support for David Bernhardt as Deputy Secretary of the Department of Interior

Dear Chairman Murkowski,

On behalf of the National Congress of American Indians, I am writing to express our support for David Bernhardt's nomination to serve as Deputy Secretary for the Department of Interior. The National Congress of American Indians advocates for policies that promote tribal sovereignty and a strong government-to-government relationship between Tribal Nations and the United States, and we believe that Mr. Bernhardt possesses the perspective, knowledge, and skills to serve as an able proponent of such policies.

As you know, Mr. Bernhardt worked for the Administration under President Bush and gained extensive experience with tribal government issues during that time. We believe he understands the complex challenges for economic development, law enforcement, education and transportation on tribal lands, and the need to support tribal solutions to address those challenges. Mr. Bernhardt also has experience working on tribal water rights, an issue that is vital to our future.

In his earlier work, Mr. Bernhardt placed considerable focus on trust mismanagement litigation. Most of that litigation has since been settled, and NCAI is encouraging a new focus on collaboration with tribal governments in implementing the Indian Trust Asset Management Reform Act of 2016. Together with Tribal Nations and Congress, we are starting a new path towards self-determination and economic development in tribal land management, and we urge continuing the restoration of the tribal land base to address the land loss and fractionation that are the legacy of failed policy eras of the past.

We believe Mr. Bernhardt is well positioned to help lead the Department of the Interior in a manner that respects and upholds the federal government's trust and treaty responsibilities to Indian tribes and empowers tribal communities to exercise greater self-determination. We urge the approval of Mr. Bernhardt's nomination by the Senate Committee on Energy and Natural Resources.

Thank you for your leadership on this important matter.

Sincerely,

Brian Cladoosby

**EXECUTIVE COMMITTEE**

**PRESIDENT**  
Brian Cladoosby  
Swinomish Tribe

**FIRST VICE-PRESIDENT**  
Fawn Sharp  
Quinault Indian Nation

**RECORDING SECRETARY**  
Aaron Payment  
Sault Ste. Marie Tribe of Chippewa  
Indians of Michigan

**TREASURER**  
W. Ron Allen  
Jamestown S'Klallam Tribe

**REGIONAL VICE-  
PRESIDENTS**

**ALASKA**  
Jerry Isaac  
Native Village of Tanacross

**EASTERN OKLAHOMA**  
Joe Byrd  
Cherokee Nation

**GREAT PLAINS**  
Larry Wright, Jr.  
Ponca Tribe of Nebraska

**MIDWEST**  
Roger Rader  
Polegon Band of Potawatomi

**NORTHEAST**  
Lance Gumbs  
Stinnescock Indian Nation

**NORTHWEST**  
Mel Sheldon, Jr.  
Tulalip Tribes

**PACIFIC**  
Jack Potter, Jr.  
Redding Rancheria

**ROCKY MOUNTAIN**  
Darin Old Coyote  
Crow Nation

**SOUTHEAST**  
Larry Townsend  
Lumbee Tribe

**SOUTHERN PLAINS**  
Liana Ohnen  
Prairie Band of Potawatomi Nation

**SOUTHWEST**  
Joe Garcia  
Chiricahua Pueblo

**WESTERN**  
Bruce Ignacio  
Ute Indian Tribe

**EXECUTIVE DIRECTOR**  
Jacqueline Pata  
Tribal

**NCAI HEADQUARTERS**  
1515 P Street, N.W.  
Washington, DC 20005  
202.466.7767  
202.466.7797 fax  
www.ncai.org



NATIONAL RIFLE ASSOCIATION OF AMERICA  
**INSTITUTE FOR LEGISLATIVE ACTION**  
 11250 WAPLES MILL ROAD  
 FAIRFAX, VIRGINIA 22030



Office of the Executive Director  
**CHRIS W. COX**

May 17, 2017

The Honorable Mitch McConnell  
 Senate Majority Leader  
 317 Russell Senate Office Building  
 Washington, D.C. 20510

The Honorable Charles E. Schumer  
 Senate Minority Leader  
 322 Hart Senate Office Building  
 Washington, D.C. 20510

Dear Majority Leader McConnell and Minority Leader Schumer:

I am writing to express the National Rifle Association's support for David Bernhardt's nomination as Deputy Secretary, U.S. Department of the Interior (DOI).

Originally from Rifle, Colorado, David is an avid hunter, shooter, and fisherman. His commitment to preserving America's wildlife resources is rooted in his own experience as an outdoorsman.

David has extensive knowledge of DOI's operations, having served the Department in multiple capacities throughout his career. In 2006 he was unanimously confirmed by the U.S. Senate for the position of Solicitor, DOI's third-ranking official and chief legal officer. In that role, he provided a wide range of advice and counsel to various DOI agencies on legal and policy matters.

In addition, David served on the Board of Game and Inland Fisheries for the Commonwealth of Virginia, where he currently lives with his wife and children. This experience has provided him with an understanding of the importance of federal-state partnerships in managing America's fish and wildlife populations.

During his tenure at DOI, David was responsible for drafting a ten year plan to implement President George W. Bush's Executive Order 13443, which expanded hunting opportunities on federal lands, as well as the management of game species and their habitats. He clearly understands the vital role hunters play in conserving our natural resources.

For these reasons, the NRA asks that the Senate quickly confirm David Bernhardt for the position of Deputy Secretary at DOI.

Sincerely,

Chris W. Cox

## ONEIDA INDIAN NATION



ONEIDA NATION HOMELANDS

May 31, 2017

The Honorable Lisa Murkowski  
Chair, Senate Committee on Energy & Natural Resources  
United States Senate  
Washington, DC 20510

Dear Chairwoman Murkowski:

Re: Support for David Bernhardt, Department of the Interior Deputy Secretary Nominee

Shekóli. I write on behalf the Oneida Indian Nation in support of the confirmation of David Bernhardt as Deputy Secretary of the Department of the Interior. Mr. Bernhardt's experience working for two Interior Secretaries during the Bush Administration convinces us that his knowledge of the Department and experience in dealing with the complex issues under its jurisdiction make him singularly well qualified for the Deputy Secretary position.

As Interior Solicitor, Mr. Bernhardt and his staff were involved in myriad thorny legal issues many of which involved Indian Country in some way, directly or indirectly. During his tenure as Solicitor, he was widely regarded as a thoughtful legal advisor to the Secretary and he was willing to defend final agency decisions in favor Indian tribes. Indeed, the United States Senate recognized his hard work and dedication when confirming him to serve as Interior Solicitor.

Further, as Mr. Bernhardt explained in his confirmation testimony of May 18, 2017, he has been recognized by tribal leaders for his work to resolve major Indian water rights disputes in Colorado, Arizona and Oklahoma. More importantly, we believe that Mr. Bernhardt understands the significance of tribal sovereignty, the real potential for tribal governments and non-tribal governments to resolve disputes by agreement where possible, and the constructive role that the federal government can play to support the negotiations and the resultant agreement.

While Mr. Bernhardt knows and respects the prerogatives of the Secretary, we think it significant that he knows and respects equally the obligation of full and meaningful government-to-government consultation before the United States takes actions that will impact Indian tribes.

The Honorable Lisa Murkowski  
May 31, 2017  
Page 2

We respectfully urge the Committee to vote to report Mr. Bernhardt out of the Committee so that his nomination can be considered by the full Senate as soon as practicable.

NΛ ki' wa,

A handwritten signature in black ink, appearing to read "Ray Halbritter", with a horizontal line drawn underneath it.

Ray Halbritter  
Nation Representative



May 15, 2017

The Honorable Lisa Murkowski, Chairman  
 Committee on Energy and Natural Resources United States Senate  
 304 Dirksen Senate Office Building Washington, D.C. 20510  
 VIA FAX 202-224-6163

Dear Chairman Murkowski:

The Outdoor Recreation Industry Roundtable (ORIR) supports the President's nomination of David Longly Bernhardt to serve as Deputy Secretary of the U.S. Department of the Interior, an appointment of great importance to the outdoor recreation industry. As the steward of more than 25% of the nation's land-base – including prime recreation sites on public lands and waters drawing more than a billion visits annually – the Department is of vital importance to our industry and its customers.

Many of us have known David Bernhardt for years through his prior public service at the Department. We have found him responsive, intelligent and committed to cooperation among government agencies at all levels and the recreation community's private sector. He understands that we manufacture, sell and service equipment ranging from RVs to boats, skis to fishing equipment and much more that make being outdoors fun. He understands that our industry has designed, built and now operates ski areas and lodging, campgrounds and marinas on public lands, and provides outfitter and guide services – again, helping Americans enjoy and benefit from the shared legacy of our national parks, national forests, national wildlife refuges, vast BLM-managed assets, the waters overseen by the Bureau of Reclamation and more.

David grew up with an appreciation of the outdoors in and around Rifle, Colorado, and those experiences have shaped his priorities and outlook. We worked with him in his role as Interior's Director of Congressional Affairs on numerous issues, including the crafting of the Federal Lands Recreation Enhancement Act, and later during his service as the department's Deputy Chief of Staff and Solicitor.

The Department needs leadership from those aware of the complexities of balancing recreation, conservation and commodity purposes – and a person who understands that there are usually solutions to even very difficult matters if time is invested in understanding the full range of alternatives and then gaining broad buy-in by the range of interests involved in Interior topics.

Those leading the Department of the Interior will play a central role in determining whether the outdoor recreation industry, now estimated to generate \$887 billion in annual spending

1200 G Street, NW • Suite 650 • Washington, DC 20005 • 202-682-9530

Letter to the Hon. Lisa Murkowski  
May 15, 2017, Page Two

and supporting some 7.6 million jobs, will continue to grow and generate economic and health benefits and support long term community sustainability in areas with major public lands. We are convinced that Mr. Bernhardt will respond to these challenges and assist Secretary Zinke in very positive ways. We respectfully request that this letter and its message of support be included in the record of the May 18, 2017, confirmation hearing by your committee on this nomination.

The Outdoor Recreation Industry Roundtable is comprised of America's leading outdoor recreation trade associations, representing thousands of U.S. businesses that produce and provide equipment, gear, apparel, vehicles and services for some 150 million Americans who enjoy our nation's public lands, waterways, and byways. Spanning outdoor recreational activities such as boating, fishing, hunting, camping, snow sports and powersports, and including recreational vehicles, outdoor equipment and clothing used to pursue these activities, the Outdoor Recreation Industry Roundtable is dedicated to growing diverse outdoor participation, expanding recreational access for Americans and promoting conservation. More information on ORIR is attached.

We look forward to working with Mr. Bernhardt and the team at the Department of Interior to advance the outdoor recreation sector, grow jobs in the U.S., and ensure robust public access and treasured experiences in the outdoors that also boost our nation's physical and mental well-being.

Sincerely,

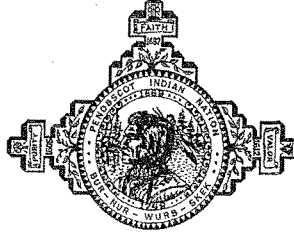
**American Recreation Coalition**  
**Archery Trade Association**  
**BoatU.S.**  
**International Snowmobile Manufacturers Association**  
**Marine Retailers Association of America**  
**Motorcycle Industry Council**  
**National Association of RV Parks and Campgrounds (ARVC)**  
**National Marine Manufacturers Association**  
**National Park Hospitality Association**  
**National Shooting Sports Foundation, Inc.**  
**Recreation Vehicle Dealers Association**  
**Recreation Vehicle Industry Association**  
**Recreational Off-Highway Vehicle Association**  
**Specialty Equipment Market Association**  
**Specialty Vehicle Institute of America**

cc: Members, Energy and Natural Resources Committee, United States Senate

## Office of the Chief and Council

Kirk E. Francis  
*Chief*

Bill Thompson  
*Vice-Chief*



Penobscot Nation  
12 Wabanaki Way  
Community Building  
Indian Island, Maine 04468  
(207) 827-7776

June 1, 2017

The Honorable Lisa Murkowski, Chair  
The Honorable Maria Cantwell, Ranking Member  
Committee on Energy & Natural Resources  
United States Senate  
Washington, DC 20510

RE: Support for Nomination of David Bernhardt as Deputy Secretary of the Interior Department

Dear Chair Murkowski and Ranking Member Cantwell,

On behalf of the Penobscot Nation, I write to express support for the nomination of Mr. David Bernhardt to serve as Deputy Secretary of the Department of the Interior. Although Mr. Bernhardt previously served at the Department during the Presidency of George W. Bush, the Penobscot Nation did not have any direct interaction with him. We are, however, aware of his interactions with other tribal nations during that time, who informed us that Mr. Bernhardt placed a priority on having honest and transparent interactions and utilizing processes that developed a record which would then provide guidance on the outcome of any decision-making. The Penobscot Nation supports these core principles for decision-making at the Department. For this reason, and those described below, we offer our support for Mr. Bernhardt's nomination.

As described during the hearing on Mr. Bernhardt's nomination, his previous experience at the Interior Department makes him well-qualified to serve in the capacity of Deputy Secretary. Although, he did not interact with the Penobscot Nation during that time, we support the statements made by him during the recent hearing and believe that those views will provide a good foundation for interactions between the Department and tribal nations.

Mr. Bernhardt confirmed that consultation with tribal nations is a necessity and that it must be both meaningful and full. He provided assurances to Senator Martin Heinrich that funding for Indian programs are not suspect and there is a solid legal basis for such funding. He also assured Senator Jeff Flake that the Department will continue to play a constructive and appropriate role in the resolution of water disputes and tribal water issues. The Penobscot Nation agrees with these viewpoints and believes that the Department has a vital role in helping to protect the rights and trust assets of tribal nations.

Murkowski and Cantwell  
Page 2  
June 1, 2017

For the reasons described herein, we offer our support of Mr. Bernhardt's nomination and look forward to working with him in his capacity as Deputy Secretary of the Department of the Interior.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Francis", with a stylized flourish extending to the right.

Kirk E. Francis  
Chief



May 18, 2017

The Honorable Lisa Murkowski  
Chairman  
Senate Energy & Natural Resources Committee  
304 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Murkowski:

The Public Lands Council (PLC) and the National Cattlemen's Beef Association (NCBA) would like to take this opportunity to express our support for the confirmation of David Bernhardt to be the Deputy Secretary of the Interior. PLC is the only national organization dedicated solely to representing the roughly 22,000 ranchers who hold federal grazing permits and operate on federal lands. NCBA is the beef industry's largest and oldest national marketing and trade association, representing American cattlemen and women who provide much of the nation's supply of food and own or manage a large portion of America's private property.

Mr. Bernhardt has a wealth of experience at the Department of the Interior, having previously served as the Department's Deputy Solicitor, deputy chief of staff and counselor to the Secretary, and as director of congressional and legislative affairs and counselor to the Secretary under former Interior Secretary Norton. He then went on to serve as the Solicitor under former Secretary Dirk Kempthorne. He is respected and widely regarded as a leader both inside and outside the Department. In his current capacity, Mr. Bernhardt leads the natural resource law practice at Brownstein Hyatt Farber and Schreck, LLP and has his finger on the pulse of everything that is happening in the natural resource world. Finally, as a native of Colorado Mr. Bernhardt understands western issues and the unique challenges that our members face while operating on public lands in the west.

Western ranchers own approximately 120 million acres of the most productive private land in the west and manage nearly 250 million acres of public land. Ranchers who hold grazing permits on public land do vital work that benefits public land including the improvement of water sources, improvement of wildlife habitat, and maintaining the open space that Americans enjoy. Having leadership at the Department of Interior who understands public lands, and who values true cooperation with stakeholders is in the best interest of all Americans.

PLC and NCBA appreciate the opportunity to provide our input on behalf of our members – the nation's food and fiber producers. We urge the Senate to confirm Mr. Bernhardt without delay.

Sincerely,

Dave Eliason  
President  
Public Lands Council

Craig Uden  
President  
National Cattlemen's Beef Association





## THE SENECA NATION OF INDIANS

12837 Route 438  
Cattaraugus Territory  
Seneca Nation  
Irving, NY 14081  
Phone (716) 532-4900  
Fax (716) 532-6272

**PRESIDENT**  
*Todd Gates*  
**TREASURER**  
*Maurice A. John, Sr.*  
**CLERK**  
*Lenith K. Waterman*

90 Ohi:yo' Way  
Allegany Territory  
Seneca Nation  
Salamanca, NY 14779  
Phone (716) 945-1790  
Fax (716) 945-0150

June 1, 2017

The Honorable Lisa Murkowski, Chairman  
The Honorable Maria Cantwell, Ranking Member  
Committee on Energy & Natural Resources  
United States Senate  
Washington, DC 20510

RE: Support for Nomination of Mr. David Bernhardt as Deputy Secretary of the Department of the Interior

Dear Chairman Murkowski and Ranking Member Cantwell,

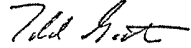
I write on behalf of the Seneca Nation to support the nomination of Mr. David Bernhardt to serve as the Deputy Secretary for the Department of the Interior. Our support is based on our previous interactions with Mr. Bernhardt when he served as the Solicitor for the Department during the Presidency of George W. Bush.

In his previous capacity as Solicitor, Mr. Bernhardt was asked to opine on the regulatory framework involving the interplay between the federal Indian Gaming Regulatory Act and the Part 292 regulations regarding restricted fee lands. This was a complex matter that related to the Seneca Nation's ability to use funds from the Seneca Nation Settlement Act to purchase lands in restricted fee status and how those lands would be treated under the Indian Gaming Regulatory Act. We found Mr. Bernhardt to be diligent, to consult with all stakeholders, to recognize the unique federal responsibility of the Department to tribal nations, and to form a record that carefully analyzed the relevant statutory and regulatory framework. More importantly, we appreciated Mr. Bernhardt not rushing the decision, but acting in a patient and deliberate manner to ensure that whatever the decision would ultimately be it was supported by an adequate record and analysis.

Given our prior interactions with Mr. Bernhardt, we believe that he will be a capable and competent Deputy Secretary who fully understands the relationship between the federal government and tribal nations and the appropriate role the Department of the Interior has to protect the trust assets of tribal nations but also support our self-determination.

For these reasons, we support the nomination of Mr. David Bernhard to serve as Deputy Secretary of the Interior Department.

Nya:weh,

A handwritten signature in black ink, appearing to read "Todd Gates".

Todd Gates, President  
SENECA NATION OF INDIANS

